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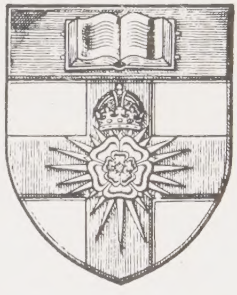

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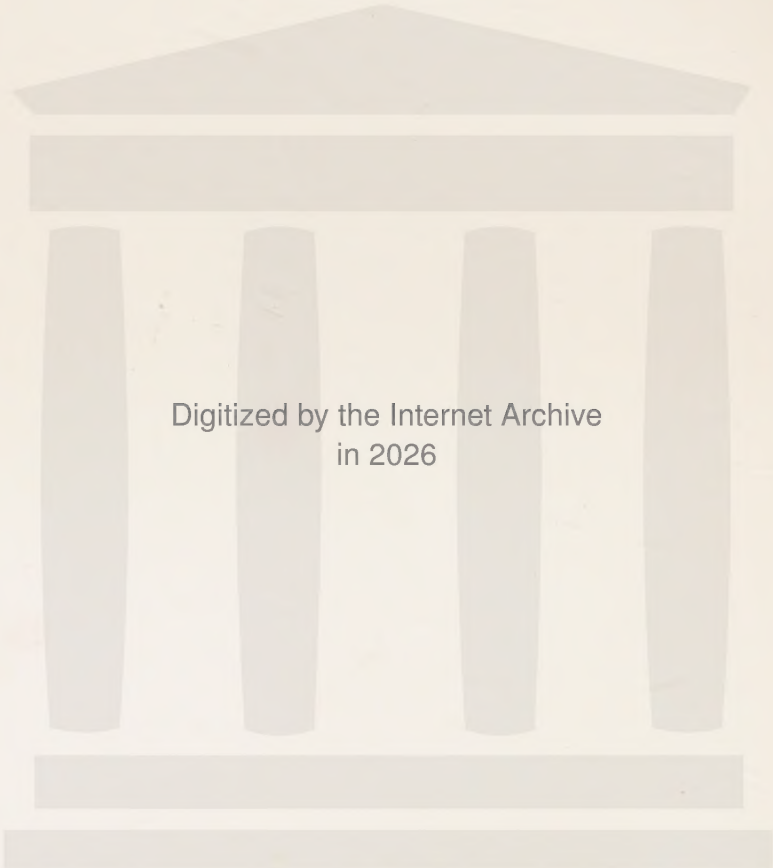

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THE

CRIMINAL APPEAL REPORTS

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

JUNE 24, 1940, TO NOVEMBER 3, 1942.

EDITED BY

T. R. FITZWALTER BUTLER,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW.

VOL. 28.

LONDON:
SWEET AND MAXWELL, LIMITED,
2 & 3 CHANCERY LANE, W.C.2.

TORONTO:
THE CARSWELL CO., LIMITED.

AUSTRALIA:
THE LAW BOOK CO. OF AUSTRALASIA, (PTY.), LIMITED.

1943.

(Printed in England.)

This Volume should be cited as 28 Cr. App. R.

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ERRATUM

Page 1, headnote, 14th line.—*For* BRETT (1873), 12 Cox C. C. 444 *read* PORTER (1873), 12 Cox C. C. 444.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE ATKINSON AND MR. JUSTICE TUCKER.

WILLIAM APPLEBY.

1940.
24 & 25 *June.*

Murder—Killing of Officer of Justice—Common Design to Resist Arrest—Use of Violence Contemplated—Degree of Violence Immaterial.

Where two persons engage in the commission of a crime with the common design of resisting by violence arrest by an officer of justice, they have a common design to do that which will amount to murder if the officer should be killed in consequence of the resistance. If, therefore, an officer of justice is killed in such circumstances, both persons are guilty of murder. If the common design is merely to refuse to submit to arrest, that does not amount to a common design to use violence; but once there is a common design to use violence in such circumstances, it matters not that the violence contemplated was not extreme violence or violence sufficient to effect the object of the design at all costs.

MACKLIN (1838), 2 Lewin C. C. 225; BRETT (1873), 12 COX C. C. 444; and BETTS AND RIDLEY (1930), 22 Cr. App. R. 148, followed and applied.

PRIDMORE (1913), 8 Cr. App. R. 198, explained.

Appeal against conviction.

The appellant, together with a man named Vincent Ostler, was convicted on May 10, 1940, at Leeds Assizes before Hilbery, J., of murder and sentenced to death.

The appellant and Ostler while committing an offence of warehouse breaking were surprised by police officers. They attempted to escape, but were overtaken, and a shot was fired by one of the men which killed one of the police officers. The case for the Crown was that Ostler had fired

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the shot and that Appleby had been heard to use words encouraging an act of violence.

Prior to the hearing of the appeal of Appleby, the Court heard an appeal against conviction by Ostler, which does not call for report. The Court dealt with both appeals in one judgment.

J. Willoughby Jardine, K.C., and *W. Willard Sexton*, for the appellant Appleby.

Russell Vick, K.C., and *D. H. Robson*, for the Crown.

The arguments of counsel appear sufficiently from the judgment, as does the material portion of the summing-up.

HUMPHREYS, J. [after stating that in the opinion of the Court there was no ground for interfering with the conviction of Ostler] : Appleby in his notice of appeal relies upon law alone, and the point is put in this way, that the learned Judge misdirected himself in law in charging the jury. What the learned Judge said was this : "It is not the law that if Appleby did not know at the outset that Ostler had taken a gun with him he cannot be guilty ", and he referred, in support of that statement, to the summing-up of Avory, J., in BROWN AND KENNEDY, [1928] *The Times*, April 28 (*a*), in which the learned Judge did make that observation. Then he continued : "I tell you that this is the way in law it is put and urged—it is for you to say whether it is made out—against Appleby. If you are satisfied that these two men were jointly engaged on this felonious enterprise of breaking and entering these Co-operative premises in order to steal therein and were united in a common resolution to resist by violence any constable who should oppose them, and the shot fired was fired at

(*a*) The summing-up is reported in full in the *Notable British Trials* series.

the police constable by one of them in pursuance of that common resolution, and killed him, killed the constable, that is murder, and they are both principals in the murder and both liable to be found guilty of murder. It may occur to you, of course, that these two men were engaged in a common enterprise of breaking and entering and stealing. You may be satisfied of that, and that that purpose of breaking and entering and stealing had been effected before the fatal shot was fired. Then you will ask yourselves: Was the shot fired in pursuance of the common design of both to resist arrest, by violence, if a police officer should attempt to arrest them? If so, then it is open to you to say that death resulted in the carrying out of that design. If it did, both are equally guilty of murder".

The ground of appeal in this case is that that direction was wrong in law, in that the learned Judge should have told the jury that it must be proved to their satisfaction that these two persons either had a common resolution to resist arrest with extreme violence, or deadly violence, or such violence as would be likely to endanger life, or that they came with a common resolution to carry out the felonious enterprise at all hazards. Mr. Willoughby Jardine has not taken the point that there was not ample evidence to justify the jury in finding, if they did find, that Appleby knew that Ostler had a pistol upon this occasion. He has addressed us upon the assumption that the jury found that it was Ostler who did fire the shot, and that Appleby was the other person. He submits that that direction was wrong, on the ground that the principal in such a case can be convicted of murder only if the killing is proved to be with intent to kill or do grievous bodily harm, and that nothing else will suffice to convict a principal in the second degree than will suffice to convict a principal in the first degree. Therefore, he says that the common design proved must be a common design to use such violence as would be likely to kill, or at least to do grievous bodily harm.

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In our view, that argument is founded upon a fallacy. The law in regard to this matter has been laid down in much the same terms for a great number of years. It is to be found, perhaps most authoritatively stated, in the late Stephen, J.,'s *Digest of the Criminal Law* (7th ed.), p. 225, and the way in which the matter is put is this: "Murder is unlawful homicide with malice aforethought. Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated". The learned author then goes on to state four of what he describes as states of mind, any one of which will suffice to show malice aforethought. The first is: "An intention to cause the death of, or grievous bodily harm to, any person . . ." I need not trouble with the second one. The third is: "An intent to commit any felony whatever". The fourth is: "An intent to oppose by force any officer of justice on his way to, in, or returning from the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed". The peculiar position of an officer of justice—which, of course, includes a police constable—is referred to by other writers of well-known text-books. It is said, for instance, in *Russell on Crime* (9th ed.), Part I, p. 412, as follows: "When a constable, or other person properly authorised, acts in the execution of his duty, the law casts a peculiar protection round him, and consequently, if he is killed in the execution of his duty, it is in general murder, even though there be circumstances of hot blood and want of premeditation as would in an ordinary case reduce the crime to manslaughter. In the earlier authorities such killing is described as of malice aforethought, as being an outrage wilfully committed in defiance of the justice of the

kingdom ". In our view, those passages show that a much less degree of violence may be sufficient to justify a verdict of guilty of murder in the case of a police officer who is killed in the execution of his duty, in arresting a person or detaining a person in custody, so long as the arrest is lawful, than would suffice in the case of another person. If that proposition is good law to-day, as in the opinion of this Court it is, it seems to follow that two persons engaged in committing a felony with a common design to resist by violence arrest by an officer, have a common design to do that which, if it results in death, would amount to murder.

That being so, it seems to us impossible to say that the direction of the learned Judge in this case was wrong. It is said to be wrong only to this extent, that the learned Judge ought to have used some language to indicate that the violence must be extreme violence. It is conceded that it would have been sufficient if he had said: " all such violence as may be necessary ", or, as Mr. Willoughby Jardine has preferred, the use of such language as: " violence to effect their object at all costs or at all hazards ". The word used here is " violence ", and in our view in this case—and every summing-up must be judged in connection with the facts of the particular case—there was no need for the learned Judge to indicate to the jury that there might be, as in truth in some other case there might be, evidence that the common design might be to do something which would not amount to real violence. This Court entertains no doubt that " violence " used in this connection means real violence, that is to say, something more than a mere refusal to submit to arrest. It probably means something more than would be sufficient to justify a conviction of obstructing the police officer in the execution of his duty; in other words, violence means violence.

Let us see if there is any evidence in this case which would indicate that the learned Judge ought to have pointed out to the jury that there was some evidence that the

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common design was not to use violence, but to use some degree of force which would not amount to violence. In our view, there is no such evidence. On the contrary, there is a good deal of evidence to indicate that the state of mind of Appleby was such as would entitle the jury to find that he, as well as his co-defendant Ostler, had a common design to use what every ordinary person would regard as violence in resisting arrest.

[His Lordship referred to the evidence in detail, and continued:]

In our view, the jury were entitled to come to the conclusion that the two prisoners were acting with a common design; that what was in the mind of Appleby, to put it at the best for Appleby, was that there should be a combined assault upon a police officer who was attempting to arrest them of such a nature, and the use of violence of such a nature, that, if it did cause death, it would amount to murder. That is the highest at which his case can be put, and, in our view, the jury were entitled to convict him of murder.

It is necessary just to refer shortly to one or two authorities. There is a passage in *Foster's Crown Cases* at p. 308 which is the original foundation, perhaps, of the statement which has already been read from Stephen's *Digest*. "Ministers of justice, while in the execution of their offices, are under the peculiar protection of the law. This special protection is founded in great wisdom and equity, and in every principle of political justice. . . . The killing of officers so employed hath been deemed murder of malice prepense, as being an outrage wilfully committed in defiance of the justice of the kingdom". On page 369 are to be found observations which have been read to this Court, in which Foster, J., draws the distinction between the case where A suggests to or directs B to commit an assault of some nature or other—and the same result would follow if he agreed with B—and where B follows those

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directions, but varies to some extent the method of execution of the assault, and the case where, A having directed or agreed with B that some particular assault should take place, B has altogether departed from that agreement or direction, and has committed a totally different offence of some sort or other. In the former case, Foster, J., observed that there can be no doubt that that is a common design, and if one of the persons does go a little further than has been agreed between them, it does not lie upon the other person who has so advised to take advantage of it, and say: "But you went a little further than I intended you to go". I think that is a very short epitome of what is to be found in *Foster's Crown Cases*.

That has been followed time after time. There is a passage in an authority which was referred to by Mr. Willoughby Jardine, MACKLIN (1838) 2 Lewin C. C. 225. It was a trial before Baron Alderson, who said in the course of his summing-up: "It is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all. The act, however, must be in pursuance of the common intent". Then, as an illustration of what would not be in pursuance of the common intent: "Thus, if several were to intend and agree together to frighten a constable, and one were to shoot him through the head, such an act would affect the individual only by whom it was done. Here, therefore, in considering this case, you, the jury, must determine whether all these prisoners had the common intent of attacking the constables —if so, each of them is responsible for all the acts of all the others done for that purpose; and if all the acts done by each, if done by one man, would, together, show such violence and so long continued, that from them you would infer an intention to kill the constable, it will be murder in them all. If you would not infer such a purpose, you ought to find the prisoners guilty only of manslaughter".

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Applying that principle to this case, no one can doubt that the acts taken together amount to an intention to kill the constable, for the last act was the shooting of the constable in the stomach at a short distance from him.

Then there is a decision of Brett, J., in PORTER (1873), 12 Cox C. C. 444, the headnote of which is as follows: "If a prisoner, having been lawfully apprehended by a police constable on a criminal charge, uses violence to the constable, or to anyone lawfully aiding or assisting him, which causes death, and does so with intent to inflict grievous bodily injury, he is guilty of murder: And so, if he does so only with intent to escape. But if, in the course of the struggle, he accidentally causes an injury, it would be manslaughter". That correctly mirrors the view expressed by Brett, J., of the law in 1873. We are not aware that that case has been dissented from in modern times.

PRIDMORE, [1913] 8 Cr. App. R. 198, at p. 199, was relied upon by Mr. Willoughby Jardine, not for the actual decision in the case, but because the Court were approving the direction of the trial Judge, which contained this expression: "I will ask you whether you think there is any evidence here that these men were engaged in a common unlawful enterprise—well, of course they were that—and that there had been any arrangement between them that if apprehension was threatened in course of the fight they would resist apprehension at all costs" That was approved by the Court as an undeniably correct expression. The Court did not say that, if the words "at all costs" had been left out, they would have disapproved, but as the words relied upon by Mr. Willoughby Jardine are the words "at all costs", it is interesting to see the view taken by a member of this Court in PEARCE, [1929] 21 Cr. App. R. 79. The judgment of the Court, consisting of the Lord Chief Justice, Avory and McCardie, JJ., was delivered by Avory, J. I only refer to the case for one purpose, and that is that in the judgment Avory, J., explained his under-

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standing of the expression " at all costs ". After referring to the facts of the case, he said, at p. 81 : " Was there any evidence from which the jury would properly infer that Pearce and Humphreys went out with a common purpose, not merely to poach, but also to resist apprehension at all costs, even by violence if necessary ? " That certainly does not look to us as if Avory, J., took the view that the expression " at all costs " indicated something of a higher degree of illegality than the use of violence ; on the contrary, probably the only meaning which could reasonably be attached to the expression " at all costs " would be this : Was there a common design to escape, and for the purpose of escaping, to do anything that they found necessary, even, as Avory, J., said, by violence ?

The last case to which it is necessary to refer is BETTS AND RIDLEY, [1930] 22 Cr. App. R. 148, where again the judgment of this Court was delivered by Avory, J. The headnote is : " In the case of a common design to commit robbery with violence if one prisoner causes death while another is present aiding and abetting the felony, as a principal in the second degree, both are guilty of murder although the latter had not specifically consented to such a degree of violence as was in fact used ". Perhaps it is necessary to say with regard to Ridley that the evidence was that he remained in a motor car for the purpose of assisting Betts, who was in fact committing the robbery with violence. At page 154 Avory, J., said this : " It is clear law that it is not necessary that the party, to constitute him a principal in the second degree, should be actually present, an eye-witness or ear-witness, of the transaction. He is, in construction of law, present aiding and abetting if, with the intention of giving assistance, he is near enough to afford it, should occasion arise. Thus, if he be outside the house, watching to prevent surprise, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal

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in the second degree. It is clear that Ridley was present in that sense, so as to make him a principal in the second degree to this crime of robbery with violence; and although it might be true to say that he had not agreed beforehand that Andrews should be struck on the head in a way likely to cause his death, it is clear upon the authorities that if he was a party to this felonious act of robbery with violence —some violence—and that the other person, the principal in the first degree, in the course of carrying out that common design does an act which causes the death, then the principal in the second degree is equally responsible in law"; and he refers with approval to a passage in *East's Pleas of the Crown* (at p. 256), and to a further passage from *Foster's Crown Cases* (at p. 369), part of which has already been read and referred to in this judgment. I only mention that because Mr. Willoughby Jardine seemed to be saying at one period of his address that, because something was law in 1830, it is something which should be looked at askance in 1940. That clearly was not the view taken by Avory, J., nor is it the view taken by this Court. In our view, that case is apposite in consideration of the present one.

On the whole we entertain no doubt that the direction in law in this case was accurate and sufficient having regard to the evidence, and that being the only point which is taken on behalf of the appellant Appleby, the appeal will be dismissed.

Appeal dismissed.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE OLIVER AND MR. JUSTICE CROOM-JOHNSON.

FRANK STEPHEN COBBETT.

1940.
12 *August.*

Murder—Defence of Provocation—Matter not referred to in Summing-up — Verdict of Manslaughter Substituted — Criminal Appeal Act, 1907 (7 *Edw.* 7. *c.* 23), *s.* 5 (2).

Verdict of manslaughter substituted under section 5 (2) of the Criminal Appeal Act, 1907, for a verdict of murder in a case where the substantial defence was that of provocation and the Judge had omitted to refer to that matter in the summing-up.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on July 22, 1940, of murder and was sentenced by Atkinson, J., to death.

On July 5, 1940, the appellant was seen by War Reserve Constable Avery near the gun-emplacement in Hyde Park. The officer observed that he was writing on a piece of paper, and came up and took the paper away from him. It proved to be an innocent document, and the officer handed it back to the appellant, who then got up from the grass on which he had been lying. Subsequently a struggle took place between the officer and the appellant. There were divergent accounts of what happened, but the undisputed facts were that the appellant was struck on the shoulder by the officer's truncheon and that he stabbed the officer in the groin with a knife. The officer died from his injuries on the following day.

J. Burge, for the appellant:

There was misdirection in the summing-up. The defence at the trial was that the officer was not at the material time acting in the execution of his duty, and that the appellant

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had received sufficient provocation from the officer to reduce the crime to manslaughter. The defence never suggested that a verdict of acquittal was possible on the evidence. The Judge in his summing-up left to the jury the issue whether or not the officer was acting in the lawful execution of his duty at the time when he was stabbed, but omitted to refer to the question of provocation at all. Further, the Judge dealt with the facts as if the evidence that the appellant had attempted to stab the officer before the officer had drawn his truncheon were undisputed, but the appellant had given evidence that the stabbing took place only after he had been struck with the truncheon, and the evidence on both sides should have been left to the jury.

L. A. Byrne, for the Crown:

It is conceded that the summing-up was defective in that it failed to refer to the question of possible provocation. It is also conceded that it omitted to refer to some parts of the appellant's evidence, but there had been so many contradictions in that evidence that it was obvious that the jury could pay little attention to it.

HUMPHREYS, J.: Mr. Byrne with his usual frankness has admitted that there are difficulties in the way of supporting the conviction of murder. The case is one in which no suggestion is made that the jury could have returned a verdict of not guilty; all that was asked at the trial by counsel for the defence was that they should return a verdict of manslaughter. On those lines the Judge summed up and the case has been argued in this Court. There is no suggestion that there was not the most ample evidence to justify the jury in returning the verdict which they did return, but it is said that the summing-up was not satisfactory.

It is probably true that the appellant is little more than a half-wit. He gave evidence at the trial, and in the course of that evidence said a number of things which almost

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amounted to a confession of murder, other things which, if true, amounted to an admission of manslaughter and, again, other things which almost amounted to a plea of not guilty. That the jury would pay much attention to the evidence of such a man is extremely unlikely, but the rule which applies to every criminal case must prevail that the jury are entitled to have put before them the evidence on both sides. The Judge, when he came to sum up, quite properly told the jury that the person who had been killed by the appellant was a police officer and that, if he was killed while in the execution of his duty in arresting the appellant, that was murder and no other question arose. The Judge, having properly directed the jury in that respect, and having told them that, quite apart from the question whether the person killed was a police officer or not, the law with regard to killing with lethal weapons was that if the blow was dealt with intent to kill or do grievous bodily harm, the killing was murder, but that if the blow was dealt without such intent, the killing was manslaughter, omitted to mention a third possibility, that, if the police officer was not at the time acting in the execution of his duty but was stabbed and killed by the appellant, there might on the facts of the particular case be a question whether there was provocation. There was certainly evidence that at the time when the knife which was in the hand of the appellant entered the body of the police officer the appellant had received a blow from a truncheon on his shoulder. Unfortunately the Judge omitted to mention the question of provocation at all, although he left it to the jury to decide whether the appellant did kill the police officer while he was acting in the execution of his duty.

The difficulties in the way of upholding this conviction do not quite end there, because the Judge, when he was dealing with the evidence, told the jury: "The case for the prosecution is this. I rest this part of it on the evidence of the man Bryant. There is no dispute about his

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evidence". That referred to the allegation that the appellant had attempted to stab the officer before any question of drawing a truncheon arose. Bryant's evidence, however, was not accepted by both sides. The evidence of the appellant was very difficult to understand, but he did say, and in one passage of his evidence put it very clearly, that his case was not that he stabbed the officer in order to escape arrest. The transcript reads: "Mr. Justice Atkinson: Is it right that you put the knife into him because he struck you with the truncheon? A. Yes. Mr. Burge: Was it because you were trying to get away to escape arrest? A. No." It was, therefore, for the jury to decide whether the evidence of Bryant or that of the appellant was true.

There may be cases in which this Court would say that there could be only one answer to the question whether the jury would necessarily have found the appellant guilty if the misdirection had not occurred, but in this case, *in favorem vitæ*, the Court is not disposed to take that course. On the whole the Court has decided to act under the powers conferred by section 5 (2) of the Criminal Appeal Act, 1907, which provides: "Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity". The Court substitutes for the verdict of murder returned by the jury a verdict of manslaughter, and for the sentence of death a sentence of fifteen years' penal servitude.

Verdict and sentence substituted.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HAWKE AND MR. JUSTICE HUMPHREYS.

WILLIAM HARTLEY.

1940.
4 *November.*

Sexual Offence—Corroboration—No Independent Evidence with Regard to Offence Charged—Independent Evidence of Earlier Offence against Same Person—Whether Corroborative.

The appellant was convicted of buggery with one H., a boy of ten years, on March 9, 1940. There was no corroboration of H.'s evidence with regard to that incident, but H. gave evidence also of an earlier offence committed against him by the appellant in an office. With regard to that earlier incident, two other young boys gave evidence on oath that they had remained outside the office when H. and the appellant went inside, and that the door had then been locked and the blinds drawn. The Judge directed the jury that they were entitled to regard the evidence of those two boys as corroborative of H.'s evidence as to the offence charged.

Held, that the direction was correct in law.

BASKERVILLE (12 Cr. App. R. 81; [1916] 2 K. B. 658) explained.

Appeal against conviction and sentence.

The appellant was convicted at Manchester Assizes before Oliver, J., on July 12, 1940, of buggery with one H., a boy aged ten years, and sentenced to seven years' penal servitude.

The count of the indictment on which the appellant was convicted charged the offence as having been committed on March 9, 1940. The other counts were by direction of the Judge withdrawn from the jury. The evidence was that H. had submitted more or less willingly to the acts of the appellant, and there was no evidence corroborating his story with regard to the incident of March 9. He gave evidence,

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however, also of a similar offence having been committed against him by the appellant on an earlier occasion in an office at the barracks where the appellant was company sergeant-major. With regard to that incident, two other young boys, named Murray and Baguley, who had not been tampered with by the appellant and who were treated as entirely independent witnesses, gave evidence on oath that after the appellant and H. had gone into the office the door was locked and the blinds drawn. Both these boys stated in their evidence that they remained outside, and Baguley said that he had tried to look through the window, but failed to see anything. The Judge directed the jury that they were entitled to regard the evidence of Murray and Baguley as corroboration of H.'s evidence as to the offence charged. The material passage of the summing-up is set out in the judgment.

Maurice Healy, K.C. (*R. E. Seaton* with him), for the appellant:

The Judge should have left it to the jury to say whether the two boys Murray and Baguley were accomplices or not, inasmuch as, when they were excluded from the office, one, with the approval of the other, tried to see what was going on inside. Further, the Judge was wrong in holding that evidence of the earlier incident was admissible. He based it on the ground that the appellant had a guilty passion for the same boy, whereas the evidence adduced by the prosecution was that he had a tendency to commit this kind of crime at large, and not with any particular person. REARDON [*1864*] (4 F. & F. 76) was an exceptional case, and the evidence of prior acts was admitted on the ground that there had been one continuous offence. [Counsel subsequently abandoned his argument with regard to the admissibility of H.'s evidence as to the earlier incident.] Further, corroboration for the offence charged on March 9 could not be provided by proving that there was corrobora-

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tion of an offence against H. by the appellant on an earlier date.

R. H. Blundell, for the Crown, was not called on to argue.

HUMPHREYS, J.: The appellant was convicted at Manchester Assizes before Oliver, J., of buggery and was sentenced to seven years' penal serviture. The appellant applied for leave to appeal against conviction and sentence, and leave was given by this Court on the ground that there was a serious matter to be argued as to the admissibility of certain evidence and on the question whether that evidence, if admissible, was corroborative of the evidence of the principal witness. Ever since the decision in BASKERVILLE (12 Cr. App. R. 81; [1916] 2 K. B. 658), which has been specifically approved in the House of Lords, the law has been very plain. The count of the indictment on which the appellant was convicted charged him with an offence against a boy of ten years of age, and the Judge throughout was at pains to inform the jury that they ought not, in his opinion, to convict the appellant of a crime of this nature on the uncorroborated evidence of a small boy. He pointed out that in this particular case the boy, while it would be an exaggeration to describe him as an accomplice, was a boy who had willingly submitted to improprieties. Moreover, it appeared that, with regard to some of the offences charged in other counts, other boys were alleged to have been present and to have been indecently assaulted also. The Judge, in mercy to the appellant, took the very strong course of withdrawing those counts from the jury, although, as he informed them, a jury was entitled in law to convict on the uncorroborated evidence of a boy or an accomplice.

It is urged, however, that, on the one count left to the jury, the Judge admitted evidence which was inadmissible and, further, misdirected the jury. In our opinion, the

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Judge was not guilty of either of those errors. Without any objection by defending counsel, the boy H. gave evidence of an earlier occasion when a similar act had taken place in the appellant's office. The date was hopelessly vague, but the occasion was marked by an incident of the boy having been sent to a shop, from which he brought back certain articles.

The first question which Mr. Healy raised was whether, the boy H. having given evidence of indecent conduct of the appellant towards him on March 9, his evidence as to similar conduct on a previous occasion was admissible. The contention that it was inadmissible was, however, abandoned in the course of the argument, and rightly abandoned, because, whenever a person alleges that such an offence has been committed against him and says that the occasion was not an isolated one, he is entitled to give evidence that the offence was indulged in habitually. REARDEN [*1864*] (4 F. & F. 76) does not throw any doubt on this proposition, but rather supports it.

In addition to H., there were in the office on that earlier occasion two other small boys, who gave evidence, which the Judge told the jury to reject. Outside the office were two other small boys, named Murray and Baguley, who also gave evidence. They were boys who had never been tampered with by the appellant, and they said that they saw H. and two other boys go into the office and that then the key was turned in the door and the blinds pulled down. Mr. Healy has complained that their evidence was inadmissible, on the ground that they might be regarded as accomplices, but no one throughout the trial ever suggested that they were, and the Judge said in his summing-up that they were entirely independent witnesses.

The only question left is whether that evidence was evidence which tended to strengthen the evidence of H. on the first count. The Judge put the matter in this way.

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Dealing with the reason why the evidence of H. as to the earlier incident was clearly admissible, he said: "The reason it is relevant to the charge is this. It is said this man had a guilty passion for this particular boy, and if he had you would expect him to indulge it more than once, and therefore if you can satisfactorily find it proved that on another occasion he was indulging himself with this boy, that will assist you to decide whether on the date March 9 he did the same thing." Later he stated the exact ground on which in his opinion—and also in the opinion of this Court—the evidence was properly left to the jury as corroboration: "If you think that boy [Murray] is telling the truth, you will have to ask yourselves whether that is not corroborative evidence upon which you can act. What was this sergeant-major doing in a locked room with the blinds down and with three little boys?" In our opinion, the matter is perfectly plain. The evidence of the boys Murray and Baguley was clearly evidence which the jury were entitled to say would strengthen the evidence of H. It is to be remembered that what is required in the nature of corroboration is not other evidence to prove the fact that the particular crime was committed, but, as was pointed out in BASKERVILLE, something quite different. In that case Lord Reading, C.J., said (12 Cr. App. R., at p. 88; [1916] 2 K. B., at p. 664): "Confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary. . . . What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it." It is a little difficult to understand how there can be any doubt whether a jury on a charge of indecent behaviour with a small boy is entitled to regard as corroborative evidence the fact that it is proved by independent evidence that the accused person was on another occasion with the boy in a locked room with the blinds drawn.

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In our opinion, the evidence of Murray and Baguley was both admissible and corroborative of H.'s evidence, and the summing-up was correct. There is, therefore, no ground for interfering with the conviction. [His Lordship went on to say that, in the opinion of the Court, there was no ground for interfering with the sentence.] The appeal, therefore, will be dismissed.

Appeal dismissed.

Solicitors—Philip Conway, Thomas & Co., for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE TUCKER.

WILLIAM THOMAS.

1941.
29 *January.*

Sentence—Power to Alter on Application for Leave to Appeal.

Reduction of sentence on application for leave to appeal. JOWSEY [1915] (11 Cr. App. R. 241) followed.

Application for leave to appeal against sentence.

The applicant was convicted at Swansea Assizes on December 9, 1940, of fraudulent conversion and was sentenced by Lawrence, J., to five years' penal servitude.

The facts, so far as material to this report, are stated in the judgment.

The Court gave leave to appeal, and intimated that they would deal with the case forthwith.

E. Anthony Hawke, for the applicant.

No counsel appeared for the Crown.

HUMPHREYS, J.: The case is undoubtedly a bad one because the applicant occupied a public position. Although of humble origin, he worked himself up to a position in which he was known as a religious and charitable man. Without that reputation he would not have been able to persuade persons to subscribe to the charity in question. He used for himself money amounting to some £300 which had been subscribed to that charity.

The case presented for him was that it was rather a question of his having muddled up the accounts of the charity than of his having deliberately stolen the money. Assuming that there may be something in that point, and

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having regard to the applicant's long life spent in honourable pursuits, the Court, although it is of opinion that the case was a serious one, considers that the sentence of five years' penal servitude was too severe, and a sentence of three years' penal servitude will be substituted.

That is a course which the Court has not usually taken. In such a case it usually grants the application, and then on a subsequent day hears the appeal. The only person, however, who would desire to be represented on the appeal would be the appellant, as the Director of Public Prosecutions does not wish to be represented on appeals involving the question of sentence only. It would, therefore, be a farce to cause expenditure of public time and money by bringing the appellant up on a subsequent day in order to inform him of the view which the Court has already formed (*a*). The Court is following the course taken in several previous cases, including JOWSEY (1915), 11 Cr. App. R. 241, where the Lord Chief Justice (Lord Reading) said (at p. 242): "It has not been the practice of this Court to make any reduction or alteration in sentences in the absence of counsel appearing on behalf of the prosecution. But it would have been ridiculous in this case to cause an expenditure of public money for the purpose of the prosecution being represented when we had determined on such an alteration in this sentence. We therefore departed from our usual practice. I only desire to add that in such cases, when the Court is of opinion that no difficulty can arise, and that there is nothing which the prosecution could properly urge against the reduction

(*a*) By s. 11 (1) of the Criminal Appeal Act, 1907, an appellant is entitled to be present on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but is not entitled to be present on the hearing of an application for leave to appeal. By sub-s. (2): "The power of the Court to pass any sentence under this Act may be exercised notwithstanding that the appellant is for any reason not present."

or alteration of a sentence, the Court will deal with the question of such reduction or alteration on the application for leave to appeal."

Sentence reduced.

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Solicitors for applicant: Smith, Rundell, Dods & Bockett, agents for Morgan, Bruce & Nicholas, Pontypridd.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE SINGLETON.

TYLER GATEWOOD KENT.

1941.
4 & 5
February.

Diplomatic Privilege—Clerk in Foreign Embassy—Dismissal—Waiver of Privilege by Ambassador—How Far Immunity Extends—Diplomatic Privileges Act, 1708 (7 *Anne*, *c.* 12), *s.* 1.

The appellant, who had been employed as a code clerk at the Embassy of a foreign Power in England, was on his dismissal arrested on charges of offences against the Official Secrets Acts and larceny, alleged to have been committed while he was a member of the diplomatic staff. He thereupon claimed diplomatic privilege, but any claim to such privilege was at once waived by the Ambassador, and subsequently by the Government, of the foreign Power.

Held, that assuming that diplomatic privilege can be claimed by a member of a diplomatic staff on a criminal charge (as to which, *quære*), the privilege was that of the Ambassador and not the individual and ceased from the moment of waiver by the Ambassador and *a fortiori* by the Government of the foreign Power.

Held, further, that the Official Secrets Acts apply to acts done by a diplomatic agent in respect of the archives of the mission in which he is employed.

Appeal against conviction.

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The appellant was convicted at the Central Criminal Court on October 28, 1940, of offences against the Official Secrets Acts, 1911 and 1920, and of larceny and was sentenced by Tucker, J., to seven years' penal servitude.

The appellant was employed as a code clerk at the embassy of a foreign Power in England, and the offences were alleged to have been committed while he was so employed. On May 20, 1940, the Government of that Power dismissed him from their service, and he was arrested on the same day. He thereupon claimed diplomatic privilege. On May 20 or 21 the ambassador of the foreign Power waived any claim of diplomatic privilege. The claim was again raised by the appellant at the trial, and was overruled by Tucker, J.

The appellant in person:

Diplomatic privilege confers immunity from criminal proceedings not only on an ambassador, but also on the members of his staff, and continues for a reasonable period after service with the embassy ceases: MUSURUS BEY *v.* GADBAN, [1894] 2 Q. B. 352. The privilege is an independent one, and cannot be waived by the ambassador, and in any event could only be waived by the ambassador with the consent of his Government: SUAREZ, *In re*, [1918] 1 Ch. 176, and REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, *In re*, [1914] 1 Ch. 139. [He referred also to MARSHALL *v.* CRITICO (1808), 9 East 447, ENGELKE *v.* MUSMANN, [1928] A. C. 433 and *Oppenheim's International Law* (5th ed.), Vol. I, p. 633.] Further, the act of taking the documents which formed the subject-matter of the charge was, so far as the British Government is concerned, an official act and a British Court has no jurisdiction to inquire into the purpose for which they were taken. A foreign embassy is foreign territory, and a crime committed therein, especially by a national of a foreign Power, is not triable by a British Court.

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The Solicitor-General (*Sir William Jowitt, K.C.*) and *G. B. McClure*, for the Crown, were not called on to argue.

THE LORD CHIEF JUSTICE: The appellant was convicted at the Central Criminal Court upon an indictment charging him with obtaining documents contrary to the Official Secrets Acts, with communicating to another person documents that might be useful to an enemy, and with the larceny of two of those documents. He was a code clerk in a foreign embassy at the time of the commission of the offences of which he was found guilty, having been appointed to that position some time in October, 1939. It was decided by his Government to discharge him on May 20, 1940, and the appellant was informed of that decision, and accordingly dismissed by letter handed to him on May 21, 1940. On the same day, or perhaps the day before, the ambassador had waived any right of diplomatic privilege, and his waiver was confirmed by his Government. The appellant was charged with the offences of which he has been convicted on August 1, 1940, having been detained in custody since May 20.

The appellant at his trial claimed diplomatic privilege, meaning, as he has contended before the Court on this occasion, that he could not be tried for an offence committed while he was a diplomatic agent or a member of the diplomatic staff, and was not liable to arrest. The appellant on this occasion has conducted his own appeal because, as he has told the Court, he knows more about his case than anyone else. I am quite sure the appellant has given us all the assistance that he has been able to give in helping us to appreciate his points, but, as will appear later, it is not easy to state them as points of law in the way in which he put them before us.

The appellant's main contention, with which I will deal at once, is that he was entitled to diplomatic privilege

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throughout the whole term of his employment and for a reasonable time thereafter, a reasonable time being, as he submitted, time sufficient to enable him to make arrangements to leave the country freely as he entered it freely. He further contends, as indeed he must if he is to make good his first contention, that waiver by the said foreign Government and by the ambassador was ineffective to deprive him of diplomatic privilege. I find it unnecessary to decide whether or not diplomatic privilege of the character discussed before us can be claimed by a member of a diplomatic staff in connection with a criminal charge; but, assuming that it can, the appellant relies for his main contention on a statement which is to be found in *Oppenheim's International Law* (5th ed.), at p. 636 (note), to the following effect: "It may be stated as a general principle that, at any rate according to English law, the immunity of an envoy from civil process continues after the termination of his diplomatic mission for such reasonable period as is necessary to enable him to wind up his official business": MUSURUS BEY *v.* GADBAN, [1894] 2 Q. B. 352, and SUAREZ, *In re*, [1918] 1 Ch. 176. I will refer to those cases in a moment.

The first thing to be said is that the privilege claimed by the appellant is a privilege which is derived from, and in law is, the privilege of the ambassador and ultimately of the State which sends the ambassador. It was a privilege which was originally based on the comity of nations, before it was stated in an Act of Parliament (the Diplomatic Privileges Act) in the reign of Queen Anne in 1708. Lord Buckmaster, in the case of ENGELKE *v.* MUSMANN, said ([1928] A. C. 433, at p. 440): "My Lords, the privilege affording ambassadors and other accredited representatives of foreign countries immunity from all writs and processes is an ancient doctrine of the common law declared in terms by the statute 7 Anne, chapter 12"; and the statement that I have made that the privilege is the

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privilege of the ambassador was made by the Lord Chief Justice (Lord Hewart) in the case of DICKINSON *v.* DEL SOLAR, [1930] 1 K. B. 376, at p. 380, where, giving judgment, he said: "The privilege is the privilege of the Sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the Sovereign or of the official superior of the agent." Then he referred to two cases, TAYLOR *v.* BEST (1854), 14 C. B. 487, and SUAREZ, *In re* (*supra*). Further, in MARSHALL *v.* CRITICO (1808), 9 East 447, Lord Ellenborough says: "This is not a privilege of the person, but of the State which he represents."

Now the cases which have been relied upon by the appellant are cited in the note that I have read from Oppenheim's work, and are not any authority that an official, after dismissal and waiver of diplomatic privilege by the ambassador or by his country, can continue to claim the protection of the privilege. The privilege is the privilege of the ambassador and not of the individual, and therefore, from the moment of waiver by the ambassador and *a fortiori* by the Government, the privilege ceases. The cloak of the ambassador no longer covers the individual and the individual then becomes liable to any process of law to which ordinary people are subject. If not, the strange result would follow that a member of an ambassador's staff who had been dismissed and in respect of whom there had been a waiver of privilege could snap his fingers at the law of the country to which his ambassador was accredited, for an indefinite period called a reasonable time.

The first of the two cases to which I have referred is MUSURUS BEY *v.* GADBAN, [1894] 1 Q. B. 533, and in the Court of Appeal [1894] 2 Q. B. 352. In the Divisional Court in referring to MARSHALL *v.* CRITICO (*supra*), Wright, J., said, at p. 541: "Lord Ellenborough, in refusing to allow the privilege, did it simply on the

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ground that the State by whom the ambassador was accredited had dismissed him from his office, and, therefore, that he was disentitled to claim the privilege of an ambassador. The existence of the general privilege of an ambassador—namely, that he is exempted from being sued in the Courts of the country to which he is accredited—has not been seriously contested. It was said that there is no English authority for the proposition that the privilege continues until the return of the ambassador to his own country, or, at any rate, so long as he is reasonably and properly occupied in winding up the affairs of his embassy and preparing to return there. We think that there is sufficient authority in the text books to show that the privilege may continue in the manner in which the defendant's counsel contended for". In the Court of Appeal, in the same case, Davey, L.J., in a passage which was read during the argument, said this (at p. 362): "Paragraph 2 of the reply avers that 'Musurus Pacha remained in England only for the purpose of making the necessary preparations for his departure, and no longer than was necessary for the purpose'. Nothing to the contrary is stated in the special case, and there is nothing from which we can infer that he stayed longer than a reasonable time. I am therefore of opinion that the privilege continued until his return to Turkey, as it appears to me it would be almost an outrage on common sense to say that the privilege ceases the moment he has presented his letter of recall."

So far as the other case is concerned, SUAREZ, *In re* (*supra*), it was held by Swinfen Eady, L.J., and Warrington, L.J., that, "An ambassador or public Minister can with the consent of his Government effectually waive his privilege and that the Minister's immunity had ceased." The first of these two cases was dealing with the position which arises when the period of service of an ambassador or of his staff comes to an end; the second case

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decided that the privilege can be waived by an ambassador, with his Government's assent. Neither case is any authority for the proposition that, when the person claiming the privilege has been dismissed and the ambassador for the country has waived the privilege, notwithstanding that waiver the official can still claim to be entitled to the protection of it.

One further observation I may make on this point is that the appellant has quite rightly submitted that the privilege is derived from, or is based, as Lord Buckmaster said, on the comity of nations. It is now enshrined in the Act of Anne, but the comity of nations would be a strange source for the doctrine for which the appellant contends, for it would lead rather to the embroilment of nations than to their comity if, notwithstanding the dismissal of the person claiming the privilege and waiver of the privilege, he was still to be entitled, contrary to the interests of the country which he had been serving, to commit criminal offences with impunity. In our judgment, there is not any authority for the proposition for which the appellant contends, that in spite of his dismissal and in spite of waiver he can claim immunity from a criminal charge.

I now proceed to deal with the other points which the appellant has taken. The first is that the Official Secrets Acts of 1911 and 1920 do not apply to acts done by a diplomatic agent in respect of the archives of the diplomatic mission in which he is employed. This is one of the points which I am not sure if I have correctly appreciated from the appellant's argument. I understand his argument broadly to be that, if he was doing acts in respect of documents in the Embassy, he could not be charged with an offence under the Official Secrets Acts. It is very difficult to state the proposition in a form in which it is intelligible, but, as I understand it, I think it is really the contention, or part of the contention, with which I have already dealt, that, if he was doing an act in

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connection with the business of the Embassy, he was immune from prosecution; indeed, he was unable to commit an offence under the Official Secrets Acts. If I have correctly understood his argument, I am bound to say that I see no foundation for it. The Official Secrets Acts and the provisions under which he was charged are capable of applying to the circumstances of this case just as much as if he had obtained a document from a department of the Government of this country.

The next point which is taken by the appellant is that he was not guilty of larceny in law. The argument upon that point was that, inasmuch as the documents which he was found guilty of stealing were copies of other documents, and as the copy would in the ordinary course have been discarded, or was taken by him after it had been discarded, he could not be found guilty of stealing it. The definition in the Larceny Act, 1916, which the learned Judge read to the jury, makes it quite plain that the jury were within their rights in coming to the conclusion, on the facts of this case, that the appellant had committed the offence of stealing these documents. He took them with the intention, as he says, perhaps of destroying them, perhaps of keeping them. There is no doubt that he took them and retained them with the intention of permanently depriving the owner of the documents of possession and, in those circumstances, the point that he was not guilty of larceny in law cannot be sustained.

The appellant then relies upon a number of points in support of his contention that the learned Judge misdirected the jury on law and on fact. We have read the summing-up. Some passages therein have briefly been referred to, but I think it was a careful and an accurate statement of the law. The learned Judge read the material parts of the Official Secrets Acts, he dealt in a very careful way with the evidence which was given with reference to the activities of X Y for the purpose of dealing with the point

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that that person was an enemy agent, that point being necessary to consider in connection with the provision contained in section 2 of the Official Secrets Act, 1920. The section provides that: "In any proceedings against a person for an offence under section one of the principal Act, [the Official Secrets Act, 1911] the fact that he has been in communication with, or attempted to communicate with, a foreign agent, whether within or without the United Kingdom, shall be evidence that he has, for a purpose prejudicial to the safety or interests of the State, obtained or attempted to obtain information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy." The learned Judge was most careful to tell the jury that this section merely says that the fact that the person charged had been in communication with a foreign agent is not conclusive evidence, but it is evidence which a jury may entertain and consider that he has "for a purpose prejudicial to the safety or interests of the State, obtained or attempted to obtain information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy". The learned Judge pointed out to the jury with great emphasis that they must consider the activities of X Y as evidence against the appellant only in so far as it showed that he was in communication with a foreign agent, and that X Y was a foreign agent. A great many of the points which are taken by the appellant in support of his submission that the learned Judge misdirected the jury on law and on fact have overlooked that part of the learned Judge's summing-up to which I have last referred.

With reference to all the points, it is sufficient for me to say that, having heard the appellant, and having considered the objections he has raised, we find there is no ground on which any just criticism can be made of the sufficiency or accuracy of the learned Judge's direction.

There is one further point which is contained in, or

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perhaps referred to in, the appellant's fifth ground of appeal, that material documents necessary for his defence were not produced. That refers to the appellant's contention that, if 466 other documents which he had obtained had been produced and read to the jury and examined, he would have been in a position to show that he had those documents for an innocent purpose, and that that conclusion, if the jury had formed it, would have thrown light upon his intention in obtaining the documents which he was charged with obtaining, contrary to the provisions of the Official Secrets Acts. It is sufficient for me to say that, in our judgment, if those documents had been put before the jury, if they had been read and if they had been examined, and if every single one of them had been found to be obtained by the appellant for an innocent purpose, that is to say, a purpose not contrary to the Official Secrets Acts, they would have thrown no light at all upon the evidence which was given in connection with the documents with the obtaining of which the appellant was charged in this case. He was, for reasons which no doubt were thought sufficient, charged only with the offences connected with the telegram dated January 29, 1940, and the telegram of February 26, 1940. Those are the two documents which he was charged with obtaining for a purpose prejudicial to the safety or interests of the State, and the circumstances connected with the other 466 documents to which he has referred in his argument would, in our judgment, throw no light at all upon the circumstances connected with obtaining the documents which he is charged with having obtained improperly.

In these circumstances, we find that there is no ground upon which the verdict of the jury can be interfered with, and this appeal must be dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE TUCKER.

DOROTHY PAMELA O'GRADY.

1941.
10 *February.*

Indictment—Capital Charge—Non-capital Charges not to be Included—Summing Up—Offences under Official Secrets Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 28)—*Offences under Treachery Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 21), *s.* 1.

Where an indictment contains a capital charge, non-capital charges should, generally speaking, not be included in it.

What must be proved in a charge under section 1 of the Treachery Act, 1940, namely, an intent to help the enemy, differs from what must be proved in a charge under section 1 of the Official Secrets Act, 1911, namely, a purpose prejudicial to the interests of the State, and this distinction should be made plain to a jury.

Although section 5 of the Official Secrets Act, 1911, provides that a person charged with an offence which is a felony under the Act may, if the circumstances warrant such a finding, be found guilty of an offence which is a misdemeanour under the Act, where a person is charged with making a plan useful to an enemy for a purpose prejudicial to the safety or interests of the State, contrary to section 1 (1) (b) of the Act, a jury's attention need be directed to their power to convict of the lesser offence of wrongful retention, etc., of a plan, contrary to section 2 (1) of the Act, only if the circumstances warrant a finding of the lesser offence.

Appeal against conviction.

The appellant was convicted on December 17, 1940, at Winchester Assizes of offences against the Treachery Act, 1940, the Official Secrets Act, 1911, and the Defence (General) Regulations, 1939, and was sentenced by Macnaghten, J., to death.

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The indictment contained nine counts. Count 1 charged the appellant with treachery, contrary to section 1 of the Treachery Act, 1940, the particulars being that between August 1 and September 10, 1940, with intent to help the enemy, she conspired with some person or persons unknown to do an act likely to impede the military operations of His Majesty's Forces. Count 2 charged her with an offence under section 1 of the Treachery Act, 1940, the particulars being that between September 3, 1939, and September 10, 1940, with intent to help the enemy, she did an act, namely, made a plan, which was likely to give assistance to the military operations of the enemy. Count 3 charged her with an offence against the same section, the particulars being that between August 31 and September 9, 1940, with intent to help the enemy, she did an act, namely, cut a military telephone, which was likely to impede the military operations of His Majesty's Forces. Count 4 charged an offence against regulation 1 (d) of the Defence (General) Regulations, 1939, the particulars being that on August 9, 1940, she endeavoured to force a safeguard. Count 5 charged an offence against section 1 (1) (a) of the Official Secrets Act, 1911, the particulars being that on August 9, 1940, for a purpose prejudicial to the interests of the State, she feloniously approached a prohibited place within the meaning of the Act. Count 6 charged her with having made a plan which might have been directly or indirectly useful to the enemy for a similar purpose, contrary to section 1 (1) (b) of that Act. Count 7 charged her with contravention of regulation 2A (1) of the Defence (General) Regulations, 1939, the particulars being that between September 3, 1939, and September 10, 1940, with intent to assist the enemy, she did an act, namely, made a plan, which act was likely to prejudice the defence of the realm. Count 8 charged her with contravention of regulation 2B (1) of the Defence (General) Regulations, 1939, the particulars being that between August 31 and September 9, 1940, with

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intent to impair the efficiency of apparatus used in His Majesty's service, namely, a military telephone, she cut a military telephone wire. Count 9 charged her with contravention of regulation 3 (1) (iii) of the Defence (General) Regulations, 1939, the particulars being that she had in her possession a document containing information in respect of the measures for the defence of a place on behalf of His Majesty. The appellant was acquitted on counts 1 and 4.

The facts, arguments of counsel, and material portions of the summing-up appear sufficiently from the judgment.

J. Scott Henderson, for the appellant.

J. G. Trapnell, K.C., and *N. R. Fox-Andrews*, for the Crown.

THE LORD CHIEF JUSTICE: The appellant was convicted at Winchester Assizes before Macnaghten, J., of offences charged against her in an indictment which contained nine counts. On two of the counts (counts 1 and 4) she was acquitted. Of the remaining seven, two (counts 2 and 3) charged her with offences under the Treachery Act, 1940, and in each of those a necessary ingredient is proof of an intent to help the enemy. In the case of the second count, the offence charged was that the appellant made a plan which was likely to give assistance to the military operations of the enemy, and made it with intent to help the enemy. Similarly, the third count charged her with cutting a military telephone wire, which was an act designed to impede the military operations of His Majesty's Forces, with intent to help the enemy. The plan was also mentioned in count 6 of the indictment, which charged her with making it for a purpose prejudicial to the interests of the State, contrary to section 1 (1) (b) of the Official Secrets Act, 1911. Count 7 charged her with making it with intent to assist the enemy, and that was an offence charged under the Defence (General)

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Regulations, 1939, reg. 2A (1). The cutting of the telephone wire, in addition to being made the subject of a charge under the Treachery Act, 1940, in the third count, was made the subject of a charge in the eighth count under the Defence (General) Regulations, reg. 2B (1), where it was necessary to prove intent to impair the efficiency of apparatus used in His Majesty's service. There was a last count, the ninth, also under the Defence (General) Regulations, which contained a charge in connection with what was called a document containing information purporting to be information in respect of measures for the defence of a place.

It is obvious from a mere perusal of the indictment and from an attempt to state it intelligibly that the last six counts charging offences under the Official Secrets Act, 1911, and the Defence (General) Regulations, 1939, and the two counts (counts 2 and 3) charging offences under the Treachery Act, 1940, would not be very likely to lead to clarity of thought on the part of the jury, especially as we are told that an abstract of the indictment was not before them while the learned Judge was summing up. The Court desires me to express the view, which I do express and hold, that it is not a desirable practice, generally speaking, that a capital charge should be coupled with other non-capital charges in the same indictment. However, this indictment went before the jury and the appellant was convicted on all the counts except the first, which charged her with conspiracy with intent to help the enemy, and the fourth, which charged her with endeavouring to force a safeguard.

A necessary ingredient in the counts under the Treachery Act, 1940, is proof of intent to help the enemy. The charges under the Official Secrets Act, 1911, and the charges under the Defence (General) Regulations, 1939, do not require proof of any such intent, but require proof of something different. The charge in count 6 under the Official Secrets Act, 1911, requires proof of a purpose

prejudicial to the interests of the State, and complaint has been made by the learned counsel for the appellant that it was not left to the jury to consider whether there was anything less than an attempt to help the enemy on the part of the appellant when she made the plan. The learned Judge, in summing up to the jury, said that count 6 was a count charging the appellant with making a plan contrary to the provisions of the Official Secrets Act. Then he said: "That is precisely the same as count 2." Count 6 is not precisely the same as count 2, and if the issue had been properly stated to the jury, they should have been told that they might find that the plan was made for a purpose prejudicial to the interests of the State, and yet not find that the plan was made with intent to help the enemy. Instead of that, the learned Judge, both in the course of discussions before he came to the summing-up and in the passage which I have read in the summing-up, told the jury and gave them to understand that they could dispose of the two counts, count 2 and count 6, together, and that a finding of guilty on one necessarily involved a finding of guilty on the other and, similarly, that an acquittal on one would necessitate an acquittal on the other. In the view that we have formed, that was a misdirection.

The appellant, however, was also charged with the offence of cutting a military telephone wire with intent to help the enemy, and with an offence in respect of the same act under the Defence (General) Regulations, 1939, with intent to impair the efficiency of apparatus used in His Majesty's service. The learned Judge, when he came to deal with those two counts, one of them requiring intent to help the enemy and the other intent to impair the efficiency of apparatus, seems more than once to have intended to put them to the jury as involving precisely the same considerations. He directed the jury: "As far as the telephone wires are concerned, if you are satisfied that the act of

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cutting the telephone wires was done to impede the military operations of His Majesty's Forces, I do not see how you can come to any other conclusion than that, and if you come to that conclusion, I think that a person, doing an act for the purpose of impeding the operations of His Majesty's Forces, must, in such a case as this, be doing it with intent to help the enemy. By impeding the forces of the Crown you do help the forces of the enemy especially when the operation contemplated is an invasion of" the place mentioned. Almost at the very end of his summing-up he came back to count 3 and said: "The only count which is left for me to deal with is count 8 and that charges her with cutting a military telephone wire. It is the same as count 3, the count that I dealt with first of all." If the learned Judge meant that count 8 deals with the same subject-matter, namely, cutting the telephone wire, as count 3 deals with, the statement is open to no objection, and if it had been clearly put, no criticism could have been directed to that passage. I think that is what the learned Judge did mean. Whether he conveyed it to the jury is perhaps another question. Then the learned Judge goes on and, in a passage to which no exception at all could be taken, or indeed was taken by Mr. Scott Henderson on behalf of the appellant, points out to the jury that they could find the appellant guilty on count 8 without finding her guilty on count 3, and that was, as he pointed out, because count 3 required proof of an intent to help the enemy. However, at the end of the same passage from which I have just quoted, the learned Judge reverts a little to what he had previously said as to the similarity of the two charges in counts 3 and 8, by saying: "All these other counts really follow the first three; counts 5, 6, 7, 8 really depend on your decision on counts 2 and 3." Although the learned Judge in the passage I have read put the matter quite correctly to the jury, there is an unfortunate impression, which we find it difficult altogether to

avoid noticing, contained in the other passages in which he was dealing with counts 3 and 8, that they might deal with them together and decide what their views were on count 8 by deciding what their views were on count 3; and, on the whole, we have come to the conclusion that not only in respect of counts 2 and 6 was there a misdirection, but there was a misdirection also in respect of counts 3 and 8.

It has been submitted on behalf of the Crown that there was no miscarriage of justice even if it be taken that there was a misdirection on the part of the learned Judge, but we are not prepared to say that there was no miscarriage of justice. The jury acquitted the appellant on count 1, but that was probably, or may have been, due to the fact that there was no evidence of any person with whom she could have conspired. But we are not in a position to say that, if the jury had been clearly and correctly directed on the elements of counts 6 and 8 and of counts 2 and 3, they would have come to the same conclusion as that at which they arrived, namely, a verdict of guilty on all these counts.

Mr. Scott Henderson took the point about count 5, on which the appellant was convicted, that there was no proof that she went to a prohibited place. We think that that point fails and that the jury were within their powers in finding a verdict of guilty on that charge, having regard to the evidence.

One other point was taken by Mr. Scott Henderson, namely, that it was not left to the jury to find, as it is submitted they might have found, a misdemeanour in pursuance of section 5 of the Official Secrets Act, 1911. It was suggested that they might, if they had been properly directed, have found the appellant guilty of the lesser offence stated in section 2 of the Official Secrets Act, the offence being that she was a person having in her possession a plan and being such a person retained it when she had no right to retain it. Although it is quite true that section 5

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permits the lesser offence to be found, that is to say, a misdemeanour to be found in a case where a person is charged with an offence which is felony under this Act, it is only if the circumstances warrant such a finding. In this case, we are clearly of opinion that the circumstances did not warrant a finding of misdemeanour. The jury, in other words, were properly required to find a verdict of guilty or not guilty on the charge of felony.

In these circumstances, the grave question arises for our consideration what the proper determination of this case should be. The learned Judge sentenced the appellant to death in respect of the two charges under the Treachery Act, 1940, the sentence of death being the only punishment provided. We quash the convictions on those two counts, but the verdicts of guilty stand upon other counts of the indictment, namely, 6 and 8, as well as on other counts which are of less gravity than those counts. This is a very grave series of offences which the appellant has committed. The multiplicity of the plans, and the elaborate character of one of them which she made, the determination evinced by the appellant to proceed to commit these acts, and the cutting of the wires, show that it was not a chance or a haphazard submission to temptation, but a series of deliberate acts performed for the purpose or with the intent mentioned in the Official Secrets Acts and the Defence (General) Regulations, and the learned Judge having pronounced no sentence upon these convictions, we now pronounce a sentence of fourteen years' penal servitude.

Conviction quashed in part.
Sentence substituted.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE TUCKER.

MICHAEL BRENNAN.

1941.
10 *February.*

Venire de Novo—Charges of Attempted Buggery and Indecent Assault on Male—Plea of Guilty to Attempted Buggery—No Plea to Indecent Assault—Sentences in Respect of Both Offences.

The appellant was arraigned on an indictment containing counts for attempted buggery and indecent assault on a male person. He pleaded guilty to attempted buggery, but did not plead to the other count. He was, however, sentenced in respect of both offences.

Held, that an order in the nature of a *venire de novo* must be made with respect to the charge of indecent assault, and that the case must be remitted so that the appellant might be called on to plead to that charge, and if he pleaded Not Guilty, be tried on it.

Appeal against sentence.

The appellant was indicted at Manchester Assizes on November 26, 1940, for attempted buggery and for indecent assault on a male person. He was arraigned on both charges and said "Guilty of attempt". The Clerk of Assize then said: "That is all you are charged with." He was sentenced by Stable, J., to five years' penal servitude in respect of the indecent assault, and two years' imprisonment in respect of the attempted buggery, the sentences to run concurrently.

The appellant in person.

A. C. Munro Kerr, for the Crown:

In effect the appellant pleaded guilty to both charges.

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He was anxious to differentiate only between the full offence of buggery and the offence of attempted buggery. If, however, the Court takes the view that the appellant has not pleaded to the count for indecent assault, then he has never been tried in respect of the indecent assault, and the proceedings are to that extent a nullity. It is submitted that in that event the Court can send the case back so that the appellant may plead to that charge.

THE LORD CHIEF JUSTICE: The appellant has been sentenced to five years' penal servitude in respect of indecent assault on a male person, and to two years' imprisonment in respect of attempted buggery. To the latter offence he pleaded guilty. He did not plead guilty to the offence of indecent assault. He has not been tried on such a charge and, in these circumstances, we find it necessary to remit the case so that he can be asked to plead and, if he pleads not guilty, be tried on that charge. We must quash the conviction, and not merely the sentence, so far as it relates to indecent assault.

One conviction quashed.
Order in nature of venire de novo.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE SINGLETON.

LEWIS COLE.

1941.
29 *April.*

Evidence—Articles in Prisoner's Possession—Unnatural Offence —No Issue of Identity—Dispute whether Defence that of Mistake—Admissibility.

On the trial of a prisoner charged with indecent assault on and gross indecency with a male person, before opening the case, counsel for the prosecution asked the Judge to rule on the admissibility of indecent letters found in the prisoner's possession. These letters, which were indicative of homosexual tendencies, had been written by another person to the prisoner as far back as fourteen years ago (with one or two exceptions). The Judge ruled that the letters were not admissible as constituting adjuncts to the crimes charged, but were admissible on the ground that a defence of mistake had been foreshadowed by answers given by the prisoner in cross-examination when giving evidence at the police court. Defending counsel strenuously contended that the defence would not be that of mistake, but a complete denial of the acts charged. There was no issue with regard to the identity of the prisoner with the man who had been in association with the prosecutor at the material time. The prisoner was convicted.

Held, that, as (according to the view of the Court) the defence was not that of mistake and as there was no issue of identity, the letters were inadmissible in evidence, and the conviction must be quashed.

Held, further, that, unless counsel on both sides are in agreement as to the nature of the defence which is to be raised, argument on an issue of this kind ought not to take place at the opening of a trial.

Appeal against conviction.

The appellant was convicted at Kent Assizes on February 27, 1941, of indecent assault on and gross

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indecency with a male person, and was sentenced by Asquith, J., to nine months' imprisonment.

The following statement of facts is taken, in substance, from the judgment:

A young soldier had nowhere to sleep and was perfectly properly invited by the appellant to sleep in the appellant's room. They occupied the same bed. The soldier said in his evidence that when the light, which could be put out by a person when in bed, had been put out the appellant put his arms round him from behind, touched and pressed his stomach and did certain other indecent acts to his posterior. He said that as the result of that, coupled with the fact that he had drunk considerably more beer and whisky than was good for him, he felt a desire to vomit, and told the appellant so. He was then handed a chamber-pot by the appellant and got out of bed. He agreed that the light was then put on and that he did leave the room and in fact was sick in a lavatory. He came back again, he said, and got into bed again with the appellant, and the same indecent acts occurred again.

After hearing argument before the opening of the case, the Judge decided to admit in evidence certain letters found in the possession of the appellant. These letters had been written by another man to the appellant, in nearly every case fourteen or fifteen years ago, and indicated homosexual tendencies. The ground on which they were admitted was that a defence of mistake had been foreshadowed by answers in cross-examination made by the appellant when giving evidence in the police court. Defending counsel strenuously contended that the defence would not be that of mistake, but a total denial of the acts charged.

John Flowers, K.C., and *J. C. Llewellyn*, for the appellant.

B. H. Waddy, for the Crown.

The arguments appear sufficiently from the judgment.

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HUMPHREYS, J.: The appellant was convicted at Kent Assizes before Asquith, J., of indecent assault upon a male person and of having committed an act of gross indecency with that person, the distinction between the two charges being that in the first case it would be an answer to say that there was consent on the part of the person assaulted, and in the second case it would be quite immaterial whether he consented or not so long as the act was an act of gross indecency.

The case is one in which, in the opinion of the Court, there was ample admissible evidence to enable a jury upon a proper direction to find a verdict of guilty, but the prosecution were not content with the facts of the particular case and tendered in evidence in support of their case certain documents.

[His Lordship referred to the facts as set out above, and continued:] It may be that upon that evidence the appellant would have been convicted. No corroboration in such a case is required in law, unless in the opinion of the Judge there is some justification for the suggestion that the chief witness for the prosecution is an accomplice and has consented to the act. There was no such evidence in this case. The fact, however, that in the middle of the night the young soldier did dress himself and left that room and went straight to a police station and made a complaint there was one which the jury would be entitled to consider as showing consistency in conduct on his part.

That fact alone might have been a very awkward one from the point of view of the appellant when the jury came to consider their verdict. However, the prosecution were not content with that, but desired to introduce a further matter in evidence. A police officer who quite properly searched the appellant's room after his arrest found a number of letters. They were letters which had been written to the appellant, and with one or two exceptions written many years before. Those letters, which were

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clearly improper and tended to show that the writer and the recipient, if he kept them, were persons addicted to homosexual practices, were dated as far back as 1926 and 1927. Those letters were tendered in evidence.

The appellant having pleaded not guilty, an application was made by counsel for the prosecution to the learned Judge at once that the jury should be asked to go out of Court in order that the Judge might decide the question of the admissibility of those letters. That, in our opinion, is a most objectionable practice, in any case where it is not clear and undisputed what the issue or issues in the case are going to be. If the defence in this case had been that the acts as detailed by the soldier, who had of course detailed them in his evidence at the police court, were admitted, but that what had been done by the appellant was done without any indecent intent at all, but merely to help a man who had given an indication that he was going to be sick or something of that sort, then unquestionably the letters would have been admissible in evidence, and there is authority to that effect. But counsel of great experience, who appeared for the appellant, made it clear from the outset that the defence in this case was nothing of the sort and that his defence was going to be that the acts complained of never took place, and, if it was relevant to the matter at all, that the only contact between these two men when they were in bed was that the appellant would say, as he had said before, that he gave the other man a violent push out of bed on finding that he was going to be sick and because he did not want him to be sick in the bed. We think that it is a great pity that that statement by counsel was not accepted, because no one can know as well as defending counsel what defence is going to be raised.

Mr. Waddy said first of all that the letters might be admitted on grounds supported by the decision in GILLINGHAM (1939) 27 Cr. App. R. 143, a case which turned

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upon and was decided upon the authority of TWISS (13 Cr. App. R. 17; [1918] 2 K. B. 853). It is not necessary in this judgment to make any observations about either of those cases, because the learned Judge, having heard argument, came to the conclusion that the evidence could not be admitted upon the authority of GILLINGHAM (*supra*), and, therefore, the question of the decision in the case of TWISS (*supra*) did not arise. The learned Judge having expressed that view, counsel for the prosecution submitted that the evidence was admissible upon quite a different ground. He said that the evidence was admissible here because the defence was and must be the defence of mistake—accident as distinct from design; in other words, that the acts were not disputed, but what was disputed was indecency in the mind of the person who did the acts. Assuming that that was the case, there is no doubt that the law of this country would allow those letters to be given in evidence. What is commonly referred to as the leading case on this subject is THOMPSON (13 Cr. App. R. 61; [1918] A. C. 221), which was decided in this Court and subsequently was taken to the House of Lords. That was a case in which a person named Thompson was accused of indecency in a urinal with boys on a particular date, March 16. He was not arrested, but upon March 19 the boys, who had in the meantime complained to the police, were waiting at or about the same place and the police were also waiting and watching. The boys admittedly on that day met Thompson; no indecency took place, nor was it charged, but Thompson was then arrested. His answer at once was: "I was not the man who did this. I assume, if you tell me some indecency took place with these boys on March 16, that you are right, but I am not the man; I was not here on March 16." Upon that issue the Court of Criminal Appeal, and the House of Lords subsequently, held that a batch of photographs of an indecent character and relating to men and boys, which was found in the possession of the prisoner,

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was admissible in evidence. The judgment in that case proceeded upon, and approved of, the decision in MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES [1894] A. C. 57. That was a case which came before the Privy Council. In THOMPSON'S CASE (*supra*), in giving judgment Lord Atkinson referred to that case in these terms (13 Cr. App. R., at p. 73; [1918] A. C., at p. 227): "It is not disputed that the general principles upon which evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is admissible are correctly laid down in the judgment of Lord Herschell in MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES (*supra*, at p. 65). This evidence may be given if it be relevant to an issue raised before the jury, and it may be relevant if it bears upon questions whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." That decision has subsequently been interpreted as meaning not any fanciful defence which might be fastened upon the prisoner, but any defence fairly upon the facts of the case open to and in fact relied upon by him. That being so, their Lordships all took the view that, on the decision in MAKIN'S CASE (*supra*), although the evidence related to criminal acts other than that charged in the indictment, articles found upon a person which would indicate, or might indicate, that he was a person of the nature of the person accused of the particular crime were admissible in evidence. In that case the evidence was admitted simply and solely upon the ground that it might be assumed that the man of March 16, whoever he was, would be in possession of photographs indicating homosexuality and the man of March 19, who was the prisoner, was in fact in possession of those very things, and that was a relevant fact on the question whether he was or was not the man, as the boys swore he was, who had assaulted them upon the 16th. That is as far as the case of THOMPSON

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(*supra*) goes. In this case, on the authority of that decision, evidence could have been given against the appellant of the possession of such indecent letters as have been referred to, if those letters tended to show that he, denying his identity, was in fact the person who was with the soldier on the night in question. But he never denied his identity for a moment. Therefore, upon some other ground the evidence had to be made admissible, and one of the grounds indicated in Lord Herschell's judgment in MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES (*supra*, at p. 65) is if the evidence "bears upon questions whether the acts alleged to constitute the crime charged in the indictment were designed or accidental". That might cover the question whether the touching of a person, which is alleged by that person to be indecent, was in truth indecent in the mind of the person who committed the act or whether it was accidental. Therefore, if the defence in this case was, as the prosecution alleged and defending counsel denied that it was, that the acts or something like the acts alleged took place, but that those acts were done without any indecent intention, those letters would be admissible.

The learned Judge appreciated that that was the law, and in allowing these letters to be given in evidence, observed: "It is not an easy question, but on the whole I have come to the conclusion that these letters are admissible; not because they are adjuncts within the case of GILLINGHAM (*supra*), but because it does seem to me that a defence of accident has been raised." Now at that time no defence had been raised at all, not a word of defence had been heard, but what the learned Judge was referring to was an allegation on the part of the prosecution that at the police court some question in cross-examination had been answered by the appellant in such a way as to indicate that he might be going to raise at the trial the question of accident as distinct from design.

In our opinion it is most undesirable that such a question

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should be argued at such a stage of a trial, and this case is an admirable example of the objectionable nature of that practice. The Court does not say for a moment that the practice may not be convenient as saving a little time in a case where the defence to be raised is a matter of common agreement. Where counsel for the defence says to the Court or to counsel for the prosecution: "My defence is that my client did these things but did them with an innocent motive", then we see no reason why the matter should not be argued upon that basis. But where, as in this case, defending counsel was protesting, and protesting throughout, that the defence was quite different, it is most inconvenient, and, in our opinion, most undesirable, that the learned Judge should be put in the position of having to decide the admissibility of certain evidence because, to use his own language, it seems that the defence of accident has been raised; the learned Judge, no doubt, meant "is going to be raised". But it was not raised, and if the submission had been made that these letters were admissible at the time when the police officer was in the witness-box and after the soldier had been cross-examined, it would have been patent to anybody who had heard the case that the defence in this case had nothing to do with the question of accident or design, but was that the acts never took place. The learned Judge, therefore, in our opinion correctly stated the law, but applied it wrongly to the facts of this case, which did not admit of the doctrine, which the learned Judge quite rightly enunciated, being applied to them.

The result was that evidence of the most terrible character from the point of view of the appellant was given against him, although, in our opinion, that evidence was inadmissible. How damaging that evidence was may be shown from the mere fact that the only possible answer to those letters, if they were given in evidence, as they were, was that which the appellant himself gave, namely, that

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they were written by a homosexual person to him, he being also a homosexual person at the time, and he had to say: "But I have given up those practices and I gave them up years ago." Upon any question of discretion which arose we think that it might well have been remembered that those letters were fifteen years old, and even if they had been possibly admissible in law, the learned Judge might well have exercised his discretion on the lines referred to by the House of Lords in CHRISTIE (10 Cr. App. R. 141; [1914] A. C. 545), which is known to all criminal lawyers. It was there observed that a Judge presiding at a criminal trial may at times find it necessary to say: "Certain evidence is, strictly speaking, admissible against the prisoner, but, having regard to the prejudicial nature of that evidence and its slight evidential value, I decline to allow it to be given in this case." That is within the power of any Judge presiding at a criminal trial.

In our view it is quite impossible to say the conviction can stand, seeing that this most prejudicial evidence was, as we hold, wrongly admitted. On that ground the appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitors: Wood, McLellan & Williams, Chatham, for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE TUCKER AND MR. JUSTICE ASQUITH.

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HERBERT CHARLES BARKER.

Evidence—Admissibility—Inducement—Promise Not to Institute Criminal Proceedings—Alleged Income Tax Frauds—Extract from Hansard's Parliamentary Debates relating to Policy of Inland Revenue Board—Documents thereafter Disclosed—Conviction Quashed.

At an interview between the appellant (an accountant) a person whose income tax returns he had prepared, and two representatives of the Inland Revenue Board who were making investigations into alleged irregularities, an extract from *Hansard's Parliamentary Debates* relating to the practice of the Board with regard to voluntary disclosure by fraudulent taxpayers was communicated to the appellant. The extract concluded with these words: "If . . . the taxpayer forthwith comes forward with a full and frank disclosure of past frauds, this would be accepted by the Board as equivalent to a voluntary disclosure to the extent that the Board would not institute criminal proceedings, but would accept a pecuniary settlement." The appellant thereupon produced various books and documents, which were admitted in evidence on his trial for conspiracy to cheat and defraud the Commissioners of Inland Revenue and for delivery of a false statement of accounts for the purposes of the Inland Revenue.

Held, that the documents stood on the same footing as an oral or written confession brought into existence as the result of an inducement and ought not to have been admitted in evidence.

Appeal against conviction.

The appellant, an accountant, and one Robinson, who had employed him to prepare his income tax returns, were convicted at the Central Criminal Court on May 1, 1941, before Lewis, J., of conspiracy to cheat and defraud the

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Commissioners of Inland Revenue and of having prepared and delivered a false statement of accounts for the purposes of the Inland Revenue with intent to defraud. The appellant was sentenced to twelve months' imprisonment.

As a result of a communication from the appellant enclosing schedules which suggested that there had been irregularities, an interview took place between two representatives of the Board of Inland Revenue who were making investigations, the appellant, and Robinson. At that interview there was read in the presence of the appellant and Robinson, and handed to both of them, an extract from *Hansard's Parliamentary Debates* relating to the practice of the Board of Inland Revenue with regard to voluntary disclosure by fraudulent taxpayers, and concluding with the words: "Cases not infrequently arise in which the disclosure, though in a sense voluntary, is not made on the initiative of the taxpayer. For example, the taxpayer may have been requested to furnish accounts, or further particulars in connection with accounts already rendered, or the production of books may have been suggested. If, in such a case, the taxpayer forthwith comes forward with a full and frank disclosure of past frauds, this would be accepted by the Board as equivalent to a voluntary disclosure to the extent that the Board would not institute criminal proceedings, but would accept a pecuniary settlement." The appellant and Robinson thereupon produced two ledgers, and subsequently two further ledgers, and the appellant also produced subsequently his own private personal papers which he had used in the preparation of Robinson's returns.

At the trial the appellant was not represented by counsel, but contended that the above documents ought not to be admitted in evidence, in that they had been produced in consequence of the inducement with regard to abstention from criminal proceedings held out to him in the Hansard extract.

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H. J. Astell Burt, for the appellant.
L. A. Byrne, for the Crown.

The arguments appear sufficiently from the judgment.

TUCKER, J.—The appellant was convicted at the Central Criminal Court on May 1, 1941, on an indictment which charged him in the first count together with Herbert Joseph Robinson with having conspired to cheat and defraud H.M. the King and the Commissioners of Inland Revenue of divers sums of money then lawfully due for income tax, super-tax and surtax. There were a number of other counts charging the two men with having prepared and delivered a false statement of accounts for the purposes of the Inland Revenue with intent to defraud. The appellant and the other defendant were found guilty on the count of conspiracy and all the other counts except the last two, which concerned Robinson only and were withdrawn from the jury. The appellant appeals against his conviction on the ground that certain books and documents which were inadmissible were admitted in evidence.

The case for the prosecution was founded on frauds which were alleged to have taken place over a number of years in connection with Robinson's returns relating to his personal affairs and in connection with a business which he carried on and subsequently turned into a limited liability company. The matter came to a head in 1937, and on April 28 the Commissioners made an order for the production of books by Robinson, who had appealed against additional assessments made on him in respect of the years in question. On December 9 a letter was written by the appellant, who was a chartered accountant employed by Robinson in making his returns, in which he enclosed certain schedules which showed that there had been irregularities or a failure to disclose over a number of years a sum amounting to some £7,000 odd. On December 31

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an interview took place at which there were present two representatives of the Inland Revenue who were making investigations and the appellant and Robinson.

At that interview there was read in the presence of the appellant and Robinson, and handed to both of them, an extract from certain questions and answers in Parliament, which appears in *Hansard's Parliamentary Debates* of July 19, 1923. The material part of it was as follows: "The question of fraud and evasion in connection with direct taxation is, of course, a matter of great importance to the Exchequer, but it is not desired that fraudulent taxpayers should be deterred by the fear of criminal proceedings from making spontaneous disclosure of their misdeeds and appropriate pecuniary restitution. I will circulate with the Official Report a statement of the practice which is followed by the Board of Inland Revenue in the matter. The following is the statement referred to: 'Where the taxpayer takes the initiative and voluntarily discloses the fact of his past frauds and their full extent and is also prepared to facilitate investigation and to furnish full evidence (including not only the business books and records, but also private bank books) as may be required on behalf of the Board as to the amount of the correct liability, the Board will not institute criminal proceedings, but will accept a pecuniary settlement. Cases not infrequently arise in which the disclosure, though in a sense voluntary, is not made on the initiative of the taxpayer. For example, the taxpayer may have been requested to furnish accounts, or further particulars in connection with accounts already rendered, or the production of books may have been suggested. If, in such a case, the taxpayer forthwith comes forward with a full and frank disclosure of past frauds, this would be accepted by the Board as equivalent to a voluntary disclosure to the extent that the Board would not institute criminal proceedings, but would accept a pecuniary settlement."

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That having been read and put in the hands of both the appellant and Robinson, they then produced to the Inland Revenue inspectors two ledgers which, according to the undisputed evidence, had been fraudulently brought into existence for the purpose of misleading the Inland Revenue authorities into thinking that the total amount of these irregularities was some £7,000. It was subsequently ascertained that the total omissions or irregularities in question amounted to at least £10,400. The authorities not being satisfied with the material which they then had, another interview took place on February 22, 1938. As a result of that interview two further ledgers were subsequently produced, and the appellant produced also his own private personal papers which he had used in the course of the preparation of the returns of Robinson and Robinson's company. An examination of those documents showed that the two ledgers originally produced were incomplete, and had been brought into existence for the express purpose of being produced at that interview. This Court is satisfied that the full nature of the fraud perpetrated by Robinson became apparent on an examination of the further documents. On March 21, 1938, another interview took place between the Inland Revenue officials and Robinson and the appellant, at which the Hansard extract was again read to them, and they were again given further opportunity to make further disclosure. The Inland Revenue authorities contended that, despite that further opportunity, they had not even then made full disclosure, because there were two building society accounts which had never been disclosed. At any rate, as a result of that last interview, a letter was written on April 2, which made it clear that the full amount of the irregularities was some £10,400.

At the trial the appellant was not represented, but he quite clearly, in the course of conducting his own defence, raised the question of the admissibility of any documents which had been produced by himself or Robinson after the

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date of the interview of December 31, 1937, when this promise or threat had been held out to him. Robinson, on the other hand, was defended by counsel and in the course of his cross-examination Robinson's counsel caused to be given in evidence certain letters and certificates written later by the appellant, which the prosecution, before such cross-examination, had not sought to put in evidence. After the appellant had adumbrated his objection to these documents, he was invited by the Judge to go into it more fully at a later stage. Later he did go into it more fully and after the Judge had asked counsel for the prosecution for assistance on the matter, the Judge decided that these documents, which had by that time been received in evidence, had been properly received.

Mr. Astell Burt divided his objection to the admissibility of these documents into two different headings. He objected to the admissibility against the appellant of the documents which came into existence as the result of the cross-examination by Robinson's counsel, and he complained that the Judge did not direct the jury that those documents should not be considered as evidence against the appellant. The Court does not think that that proposition can be maintained. The evidence, it is true, was let in by counsel for the other defendant, but, having been let in, it was evidence against the appellant, and therefore it was there for better or for worse, nor could the jury be directed that they should not consider it as evidence against the appellant.

With regard to the other submission, that raises questions of difficulty and of some importance. Mr. Astell Burt has referred the Court to CASON (1935), 14 Accountant Tax Cases 471, in which the present Recorder of London (Judge Dodson as he then was) ruled that a document which had been brought into existence as the result of the reading to the defendant of this Hansard extract was not admissible in evidence, on the ground that

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it was a confession or a statement which had been made as the result of an inducement contained in the Hansard extract. Mr. Byrne on behalf of the Crown contended that the ledgers and working papers in the present case should be distinguished from the document which Judge Dodson decided was not admissible in evidence, because the documents in the present case were not documents brought into existence as the result of a promise or threat, if there were a promise or threat, in this Hansard extract, but documents which had at all times been in existence, that the two original ledgers had been brought into existence for the purpose of the fraud, that the two ledgers subsequently produced had always been in existence, and that the appellant's working papers also had always been in existence and were part and parcel of the method whereby the fraud had been committed. He contended that they could be given in evidence apart altogether from any confession or statement made by the appellant or Robinson as the result of this Hansard extract. He cited a passage setting out what he submitted was the law on this matter as summarised at p. 402 of *Archbold's Criminal Pleading, etc.* (30th ed.): "Although a confession for the above or any other reason may not be receivable in evidence, yet any discovery that takes place in consequence of such confession, or any act done by the defendant, if it is confirmed by the finding of the property, will be admitted."

The Court accepts that statement from *Archbold* as undoubtedly setting out what the law is and the Court does not desire to question for one moment the fact that there may be cases in which evidence may be given with regard to facts or matters the existence of which may have come to the knowledge of the police as the result of some inadmissible confession. But in this particular case, having regard to the nature of the Hansard extract and the precise words used, the Court is of opinion that the promise expressly relates to the production of business books and

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records, and that if as a result of the inducement or threat, which is contained and is implicit in this Hansard document, such books and documents are in fact produced by the person or persons to whom such inducement or promise is held out, such documents so produced stand on precisely the same footing as any oral or written confession which may be brought into existence as the result of such promise. The result is that the Court is of opinion that these very vital documents and books were wrongly admitted in evidence. The Court has not lost sight of the fact that the Hansard extract in terms refers to the taxpayer and not to the accountant, but having regard to all the circumstances of the case and to what took place on December 31, 1937, the Court has no doubt that the promise contained in the document was intended to apply and was held out to the appellant just as much as to Robinson.

Accordingly, the Court is of opinion that this conviction must be quashed.

Conviction quashed.

Solicitors: J. B. Milner & Son, for appellant; Solicitor of Inland Revenue, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE TUCKER AND MR. JUSTICE ASQUITH.

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ERNEST PRINCE.

Murder—Summing-up—Provocation—Duty to Acquit in Case of Reasonable Doubt even if Prisoner's Explanation not Accepted—Verdict of Manslaughter Substituted.

Verdict of manslaughter substituted for that of murder in a case where the Judge had omitted to direct the jury that, if upon a review of all the evidence, they were left in reasonable doubt whether, even if the prisoner's explanation were not accepted, the act was provoked, he was entitled to be acquitted on the charge of murder.

WOOLMINGTON *v.* PUBLIC PROSECUTIONS (DIRECTOR) (25 Cr. App. R. 72; [1935] A. C. 462) applied.

Appeal against conviction.

The appellant was convicted at Derbyshire Assizes on June 21, 1940, of the murder of a man named Bown and was sentenced by Oliver, J., to death.

The following statement of facts is taken, in the main, from the judgment of the Court.

The appellant was a miner, thirty-two years of age, and on March 30, 1941, had been out of work for some weeks and was in debt. Bown, an older man, was a caretaker employed by a firm of retailers in Chesterfield, and was accustomed to sleep in a corner of the premises, where fire-watchers' equipment, including three firemen's axes, were kept.

On Sunday, March 30, about 1.30 p.m., Bown was in the Phoenix public house and the appellant was there about the same time. Bown showed some notes to the wife of

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the licensee and then went to the premises where he was employed. The appellant went to the same premises, and while they were there one of the members of the firm named Eyre, who had been let in by Bown, went on to the roof for fire-spotting practice. When he came down, he called for Bown to let him out, but there was no reply. Soon afterwards Bown was found dead. He had been killed by a number of blows, four of which, according to the medical evidence at the trial, would have been fatal. The blows had been struck with some such weapon as a fireman's axe, and had been struck with the blade of the weapon from behind as well as from in front. Bown had been struck with the spike of the axe which had been driven into each side of his head just before he died.

The appellant first made a statement containing a number of allegations as to his movements on the afternoon of March 30, all of which he admitted at the trial to have been false. He then made a further statement, in which he said, for the first time, that Bown had made an indecent suggestion to him as he was sitting on one of the beds; that he grabbed the axe, which was near, to hit Bown and lost all reason; and that when he realised what he had done he took Bown's money to make it look like a robbery. He gave evidence at the trial of persistent indecent suggestions on Bown's part, and mentioned incidents which were not referred to in either of his previous statements.

F. Lee, for the appellant:

The summing-up, though favourable to the appellant in some respects, did not satisfy the requirements of WOOLMINGTON *v.* PUBLIC PROSECUTIONS (DIRECTOR) (25 Cr. App. R. 72; [1935] A. C. 462). The jury were not specifically directed that, even though they refused to accept the appellant's version of what happened, if they were left in reasonable doubt whether his act was provoked, they ought not to convict of murder.

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Constantine Gallop, for the Crown:

The summing-up, regarded as a whole, made it clear that the burden of proof was on the Crown.

THE LORD CHIEF JUSTICE [after stating the facts]: In his direction to the jury the Judge said that it had not been contended by counsel for the defence that the verdict could be anything less than manslaughter. Three criticisms of the summing-up had been made, to only one of which is it necessary to refer in more than a few words. First, it was argued that the Judge misdirected the jury by making observations which were likely to leave doubt whether they were the Judge's expression of opinion or directions which were bound to be followed by the jury; secondly, it was contended that the Judge failed to direct the jury adequately on some of the evidence given in cross-examination by the doctor who was called to prove the wounds. The doctor said that the wounds were such as could be caused by a man under the impulse of indignation, provocation or temper. In our view, there is nothing of substance in either of these contentions. It was too evident for discussion that the man who inflicted the horrible wounds on Bown had been under a mass of impulses, which were capable of being described by one of those words.

A further criticism, however, was made that there was non-direction on the onus of proof where the defence is that there was provocation sufficient to reduce the charge to manslaughter. In his summing-up the Judge first dealt generally with the question of the onus of proof, and after saying that a verdict of guilty could be returned only if the jury were satisfied that the case, whatever it might be, was proved, added: "If you are left in any position of doubt, reasonable doubt, as to the truth of what happened, you will not convict". He next dealt with the question of self-defence, directing the jury's attention to the character of the wounds. The learned Judge then proceeded to deal with

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the question of manslaughter. He said: "If you think that [the alleged conduct of Bown] is such conduct as to deprive a reasonable man of his self-control to such an extent that he would strike the blows which brought about his death, then you will say 'we reduce this crime to manslaughter'." In a later passage he said: "Members of the jury, when . . . you are considering provocation, even taking the story of the prisoner in the best possible light for him, do you find, in the circumstances he has told you, anything which could so deprive a reasonable man of his senses as to account for such an attack as the evidence shows?" Finally, at the end of his summing-up he said: "Killing of this sort is undoubtedly murder unless you think that the provocation he received . . . would be sufficient to deprive a reasonable man of his self-control so as to cause him, a reasonable man, to use the violence that was used on this occasion. If you think that, you may reduce the crime to manslaughter."

From one point of view that direction was not unfavourable to the appellant, taken in conjunction with the earlier passage which I have read, because it tells the jury that, if they think that the conduct about which the appellant had given his story was sufficient to deprive a reasonable man of his control so as to cause him to use the violence which was used on that occasion, the crime should be reduced to manslaughter. However, counsel for the appellant has quite properly called our attention to the comparatively recent decision of the House of Lords in WOOLMINGTON *v.* PUBLIC PROSECUTIONS (DIRECTOR) (25 Cr. App. R. 72; [1935] A. C. 462), where Lord Sankey, L.C., having called attention to the fact that it is the duty of the prosecution to prove the prisoner's guilt, elaborated that by saying (25 Cr. App. R., at p. 96; [1935] A. C., at p. 482): "When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown, that the act on his part which caused death

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was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. It is not the law of England to say, as was said in the summing-up in the present case: 'If the Crown satisfy you that this woman died at the prisoner's hands, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing it was a pure accident.'"

After deliberation we have come to the conclusion that the Judge did not give to the jury a direction of the character which Lord Sankey, L.C., states as the law. We think that the summing-up was insufficient having regard to the absence of any direction that, if upon a review of all the evidence, the jury were left in reasonable doubt whether, even if the appellant's explanation were not accepted, the act was provoked, the appellant was entitled to be acquitted of the charge of murder. The direction being, in our view, insufficient, we think it impossible that the verdict of murder should stand, and in its place we substitute a verdict of manslaughter, and a sentence of fifteen years' penal servitude.

Verdict and sentence substituted.

[IN THE HOUSE OF LORDS.]

CORAM:

THE LORD CHANCELLOR (VISCOUNT SIMON), VISCOUNT SANKEY, LORD RUSSELL OF KILLOWEN, LORD WRIGHT AND LORD PORTER.

MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*On behalf of His Majesty*).

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Murder—Summing-up—When Direction on Manslaughter Necessary—Substantial Defence that of Self-Defence—Alternative not Stressed by Counsel—Provocation—Effect of Reasonable Doubt.

It is not the duty of the Judge in every trial for murder to include in his summing-up observations on the question of manslaughter, whatever the circumstances; but there should be a direction on manslaughter, when the evidence is such as might satisfy the jury that elements are present which would reduce the crime to manslaughter, or induce a reasonable doubt on this question. Even where the substantial defence is that of self-defence, the summing-up should deal adequately with any other view of the facts which might reasonably arise out of the evidence, and which would reduce the crime to manslaughter. The fact that defending counsel does not stress an alternative case before the jury does not relieve the Judge from directing the jury to consider the alternative, if there is material to justify a direction that they should consider it.

If the jury are left in reasonable doubt whether the act was unintentional, that is, a pure accident without criminal negligence, the verdict should be Not Guilty. If they are left in reasonable doubt whether the act was perpetrated under the impulse of provocation, the verdict should be Guilty of Manslaughter.

WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (25 Cr. App. R. 72; [1935] A. C. 462) explained.

To reduce the crime of murder to manslaughter, provocation must be such as temporarily deprives the

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person provoked of the power of self-control, as the result of which he commits the act which causes death. In applying the test, it is of particular importance to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and to take into account the instrument with which the homicide was effected. The mode of resentment must bear a reasonable relationship to the provocation.

Appeal by the prisoner from an order of the Court of Criminal Appeal dismissing his appeal against conviction.

The appellant, Antonio Mancini, was convicted at the Central Criminal Court on July 4, 1941, of murder and was sentenced by Macnaghten, J., to death.

The appellant appealed to the Court of Criminal Appeal on the ground (*inter alia*) that the summing-up did not adequately deal with the possibility of a verdict of manslaughter.

On August 20, 1941, the appeal came on for hearing before a Court consisting of the Lord Chief Justice, Hawke and Humphreys, JJ. Re-argument before a Full Court was then ordered.

On September 3, 1941, the Court consisting of the Lord Chief Justice, Hawke, Humphreys, Hilbery and Tucker, JJ., dismissed the appeal, holding that the jury had been directed in such terms that they had the fullest opportunity of returning a verdict of manslaughter if they thought proper.

The appellant obtained a fiat from the Attorney-General under section 1 (6) of the Criminal Appeal Act, 1907, for an appeal to the House of Lords.

The following statement of facts is taken from the speech of the Lord Chancellor:

Mancini was the manager of an enterprise called the Palm Beach Bottle Party, with premises in the basement of 37, Wardour Street. On the ground floor of that building were the quarters of a club, on which nothing

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turns, and on the first floor there was housed the West End Bridge and Billiards Club, of which Mancini was a member. Distleman was also a member of that club, and between three and four o'clock on the morning of May 1, when he and a number of other members (including a man named Fletcher and Mancini himself) were on the premises, he received a fatal wound in the left shoulder: a main artery was severed. The nature of the wound established that it must have been caused by an instrument with a two-edged blade, with a sharp point and sharp sides, at least five inches long. Mancini at first told the police that he saw a dagger-knife on the floor and picked it up as Fletcher was advancing to strike him with a chair, but at the trial he admitted that he had such an instrument in his pocket—he described it as a knife about seven inches long—which he said that he had bought some weeks previously because his life was threatened by gangs of roughs. He said that, in the course of fighting or struggling which took place among a number of persons present in the club, he was attacked by Distleman, when he drew the dagger from his pocket and struck out blindly, though without aiming at any particular individual. There had been an earlier violent altercation in the club when Mancini was not present, as the result of which Fletcher sustained head wounds, and had to go with his friend Distleman to Charing Cross Hospital, where two stitches were put in. It was after this that he and Distleman returned to the club.

There was evidence that Fletcher was at enmity with Mancini, owing to the latter's having at an earlier date taken steps to exclude Fletcher from the bottle party. When Fletcher and Distleman re-entered the club and found Mancini there, Mancini, according to the evidence of the club doorkeeper, came across to Fletcher and seized him by the neck or top of the coat. Distleman went to Fletcher's aid, seized Mancini's shoulder or arm, and aimed

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a blow at him. It is at this point that Mancini whipped out his dagger and inflicted the fatal blow on Distleman, and a little later slashed Fletcher's hand so that he was severely cut. Distleman, mortally injured, made his way out of the room, but he collapsed at the bottom of the stairs and died in a few minutes.

Mancini gave evidence that he threw his dagger away, and consequently this weapon was not forthcoming; but the police-constable who shortly afterwards came on the scene found a small pocket-knife with its blade opened lying at the side of the dead Distleman in the doorway leading to the street. The pocket-knife was proved to have belonged to the dead man, but how it came to be lying open beside him at the bottom of the stairs was not explained. Shortly after these events Mancini decided to go to the police and make a statement, but at that time he was not aware of the discovery of Distleman's pocket-knife, and, while he described his own action as taken in self-defence, he made no mention whatever of a knife in Distleman's hand. Indeed, in his first statement to the police he made no mention of any attack on him by Distleman at all. At the trial, however, after hearing the police evidence, he amended his previous story and declared that Distleman attacked him with the open pen-knife, and that when coming up the stairs to enter the club he had heard a voice behind him like Fletcher's saying, "Let's knife him". No other witness saw any knife in Distleman's hand, or heard Fletcher's previous remark, though it would appear that some of these witnesses, if their statements are correct, should have done so.

Hector Hughes, *K.C.*, and *F. D. Levy*, for the appellant:

The point of law raised in this case is whether the Judge at the trial sufficiently directed the jury on the question of provocation. There was ample evidence of provocation

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of the appellant by Distleman, and the jury should have been specifically directed that Distleman was an aggressor. He had been six times convicted of assault and his whole record showed that he was a man of pugnacious temperament. [Counsel then referred in detail to the evidence of the circumstances of the fatal blow, and said that he was not asking the House to record an acquittal of the appellant on the ground of self-defence, but only an acquittal on the charge of murder.] Special reliance is placed on the fact that Distleman approached the appellant from behind and aimed a blow at him. Further than that, there was a series of other incidents creating provocation which culminated in the final act of provocation. The summing-up did not adequately direct the jury on the subject of provocation. The Judge should have told the jury (i) what constituted provocation; (ii) that if the appellant's act in striking the fatal blow was the result of provocation, he was entitled to be acquitted of murder; (iii) that, if there was reasonable doubt whether or not that act was provoked, he was entitled to be acquitted.

The Attorney-General (*Sir Donald Somervell, K.C.*) *G. B. McClure*, and *Christmas Humphreys*, for the Crown:

The ground on which the Court of Criminal Appeal thought the appeal was a difficult one arose from a misconception of the effect of the decision in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (25 Cr. App. R. 72; [1935] A. C. 467) on the question of summing-up with regard to provocation. Where there is evidence of an intentional act which has caused death and the question of provocation does not arise out of the evidence, no onus rests on the prosecution to negative provocation, nor is there any duty resting on the Judge to invite the jury to speculate on incidents, which if they had occurred, would have been admissible in evidence, when in fact there had

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been no evidence of such incidents. It is for the defence to show that there were circumstances sufficient to reduce the act from murder to something else. The preliminary matters on which counsel for the appellant has relied did not begin to form a basis for provocation. If the summing-up is open to any criticism, it can only be on the ground that it was too favourable to the appellant.

[In reply to the Lord Chancellor, the Attorney-General said that he respectfully asked the House to consider whether it would lay down the proposition that there was no necessity for a Judge trying a charge of murder in every instance automatically to discourse to the jury on manslaughter and that that duty arose only if the materials before him either raised that issue directly, or, at any rate, left open a possibility of doubt on the matter.]

Hector Hughes, K.C., in reply:

The first proposition contended for in the argument for the Crown is not disputed, but it does not apply to the facts of the present case.

The House took time for consideration.

October 16.—THE LORD CHANCELLOR:

My Lords, on July 4, 1941, at the Central Criminal Court, the appellant, Antonio Mancini, was found guilty by the jury of the murder of Harry Distleman, and was sentenced to death by the presiding Judge, Macnaghten, J. Mancini appealed on the ground of misdirection to the Court of Criminal Appeal, where there were two hearings. The first took place on August 20, and, as a result, re-argument before a Full Court was ordered. The case was accordingly re-heard on September 3 before the Lord Chief Justice and four other Judges, when the appeal was dismissed. On September 11 the Attorney-General,

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acting under section 1 (6) of the Criminal Appeal Act, 1907, gave his certificate that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance, and that, in his opinion, it was desirable in the public interest that a further appeal should be brought. Accordingly, the present appeal has come before this House: it is the third appeal on a conviction for murder to reach the House of Lords since the passing of the Criminal Appeal Act thirty-four years ago.

[The learned Lord Chancellor then stated the facts as set out above and continued:] The main case set up on behalf of the accused at the trial was self-defence and the Judge devoted the first portion of a very careful summing-up to this question. Mancini's counsel found no fault with that part of the Judge's charge at all. It was in fact, if anything, too favourable to the accused, for Macnaghten, J., did not invite the jury to consider whether, even if it were true that Mancini was menaced with the pen-knife, that would justify the use of Mancini's terrible weapon so as to constitute a case of necessary self-defence, nor did the Judge make any observations on the question whether Mancini could have not escaped from the threatened danger by retreating from the club. The Judge was content that the jury should deal with the question of self-defence on the basis that, if they believed Mancini's story at the trial about Distleman's advancing with the open pen-knife in his hand, they should return a verdict of "Not Guilty". The jury's verdict shows that they disbelieved Mancini's story. Self-defence by the use of so deadly a weapon could not be made out if Mancini was never threatened with the pen-knife, and the Judge accordingly proceeded to charge the jury on the alternative view that, though if Mancini were disbelieved self-defence must be rejected, yet the circumstances might still justify the jury in returning a verdict of manslaughter rather than of murder. It is to a part of the Judge's summing-up on this

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topic that objection is taken, and it is contended for the appellant that the language of Macnaghten, J., was not in accord with the law laid down by this House in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (25 Cr. App. R. 72; [1935] A. C. 462).

Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence—a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal—it was undoubtedly the duty of the Judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) did not relieve the Judge from the duty of directing the jury to consider the alternative, if there was material before the jury which would justify a direction that they should consider it. Thus, in HOPPER (11 Cr. App. R. 136; [1915] 2 K. B. 431), at a trial for murder the prisoner's counsel relied substantially on the defence that the killing was accidental. But Lord Reading, C.J., in delivering the judgment of the Court of Criminal Appeal, said ([1915] 2 K. B., at p. 435): "We do not assent to the suggestion that as the defence throughout the trial was accident, the Judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the Judge to put such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some

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evidence—we say no more than that—upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand."

To avoid all possible misunderstanding, I would add that this is far from saying that in every trial for murder, where the accused pleads Not Guilty, the Judge must include in his summing-up to the jury observations on the subject of manslaughter. The possibility of a verdict of manslaughter instead of murder only arises when the evidence given before the jury is such as might satisfy them as the judges of fact that the elements were present which would reduce the crime to manslaughter, or at any rate might induce a reasonable doubt whether this was, or was not, the case. Murder by secret poisoning, for example, does not give room for the defence that, owing to provocation received, the administration of the poison should be treated as manslaughter. On the other hand, if the defence to a charge of murder by poisoning were that the accused never administered the poison at all, the Judge might very well be obliged to direct the jury on the alternative view that the administration was accidental, if the facts proved reasonably admitted this as a possible interpretation, even though the defence had not relied on the alternative.

In the present case the appellant's counsel contended that the Judge should have directed the jury as to what would amount to provocation sufficient to reduce the felonious act to manslaughter, and should have told them that, if they took the view that Mancini's act was provoked in this sense, they should acquit him of murder, and moreover that if, without being satisfied on the point, they felt a reasonable doubt whether the act was or was not so provoked, Mancini was still entitled to be acquitted of murder and should be found guilty only of manslaughter. All this, however, depends on the view that there was evidence before the jury which might, if believed, be regarded as

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amounting to sufficient provocation. It is here, I think, that the contention for the appellant breaks down.

It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death. "In deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which causes death, to the offender's conduct during that interval and to all other circumstances tending to show the state of his mind" (*Stephen's Digest of the Criminal Law*, Article 317). The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in LESBINI (11 Cr. App. R. 7; [1914] 3 K. B. 1116), so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (1) to consider whether a sufficient interval had elapsed since the provocation to allow a reasonable man time to cool, and (2) to take into account the instrument with which the homicide was effected: for to retort, in the heat of passion induced by provocation, by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.

Before, therefore, Macnaghten, J.'s summing-up can be criticised on the ground that it did not deal adequately with the topic of provocation, we have to see what was the extent of the provocation as disclosed by the evidence which the jury had to consider; and for this purpose we have to exclude altogether the allegation made by the prisoner

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that he heard the voice of Fletcher threatening him with "knifing", and that Distleman came at him with an open pen-knife in his hand. The Judge had already instructed the jury fully on these matters and had directed them to acquit Mancini altogether if they felt that they could accept Mancini's story. The alternative case, therefore, as to which it is suggested that a defence of provocation was open, must be regarded on the basis that Mancini's story was rejected. In that view the only knife used in the struggle was Mancini's dagger, and this followed Distleman's coming at him and aiming a blow with his hand or fist. Such action by Distleman would not constitute provocation of a kind which could extenuate the sudden introduction and use of a lethal weapon like this dagger, and there was, therefore, on the assumption that Mancini's evidence was rejected, no adequate material to raise the issue of provocation. The Judge, indeed, in his summing-up never uses the word "provocation" as the ground on which a verdict of manslaughter might be based. The passage complained of in the summing-up runs as follows: "If you think that there was such a disturbance going on, unprovoked by him—he was not justified, of course, in using the dagger assuming you reject the plea of self-defence, that cannot be justified—but if in the whole of the circumstances, as far as you know them, having regard to the character of the people there, and the sort of conduct which was going on in such a place, you think that the blow may have been struck without any premeditation and in the excitement of the disturbance, whatever it was, it seems to me you might be justified in returning the verdict of manslaughter."

It seems probable that the Judge in that passage was not referring to the defence of provocation, but rather had in mind the excuse which in the old books went by the name of "chance-medley" (see, for example, *Blackstone*, Book IV, p. 184); but however the defence may be

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classified, the verdict should not, in my opinion, be upset on the ground of the above extract from the Judge's charge. It was argued that the Judge, instead of saying that the jury " might " be justified, should have told them that, if they thought that the blow might have been struck without any premeditation and in the excitement of the disturbance, they " should " return a verdict of manslaughter. Such an argument refines too much. The sentence must be read as a whole, and a conviction ought not necessarily to be quashed by picking a quarrel with a single word. I am satisfied that a jury would not be misled by the Judge's phrasing, and the word " might " is to be explained by the preceding use of the word " may ". In my opinion, moreover, there was not sufficient evidence (once the story of being attacked with the pen-knife was discarded) to justify a verdict of manslaughter arising from the use of the dagger.

As regards the more general question with which the Attorney-General asks the House to deal, I would formulate the following propositions :—

(1) WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*) is concerned with explaining and reinforcing the rule that the prosecution must prove the charge it makes beyond reasonable doubt, and consequently that if, on the material before the jury, there is a reasonable doubt, the prisoner should have the benefit of it. The rule is of general application in all charges under the criminal law. (The only exceptions arise, as explained in that case, in the defence of insanity and in offences where onus of proof is specially dealt with by statute.) Thus, when a prisoner is charged with murder and felonious homicide is proved against him, if the jury, when considering the evidence as a whole at the conclusion of the case, are left in reasonable doubt whether the homicide proved is not manslaughter, they should return a verdict of manslaughter. WOOLMINGTON'S CASE (*supra*) was one in which

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the defence to the charge of murder was that of pure accident in circumstances not alleged to amount to criminal negligence. The prisoner gave evidence to that effect, and my noble and learned friend, Lord Sankey, lays it down (at pp. 96 and 482 of the respective reports) that "if the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional . . . the prisoner is entitled to be acquitted". A proposition to the same effect, but in different language, had been laid down by Lord Reading, C.J., in connection with a charge of receiving recently stolen goods, in ABRAMOVITCH, (1914), 11 Cr. App. R. 45, at p. 49, and was approved in WOOLMINGTON'S CASE (*supra*). The law on this subject is thus finally established and is, I think, perfectly clear.

(2) The language employed by Lord Sankey does not assert and does not imply that in every charge of murder, whatever the circumstances, the Judge ought to devote part of his summing-up to directing the jury on the question of manslaughter, or that the jury ought to consider it. If the evidence before the jury at the end of the case does not contain material on which a reasonable man could find a verdict of manslaughter instead of murder, it is no defect in the summing-up that manslaughter is not dealt with. Taking, for example, a case in which no evidence has been given which would raise the issue of provocation, it is not the duty of the Judge to invite the jury to speculate as to provocative incidents, of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is on the evidence, and the evidence alone, that the prisoner is being tried, and it would only lead to confusion and possible injustice if either Judge or jury went outside it.

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(3) There is no prescribed formula for summing-up in a trial for murder, but the essential rules on this particular matter are as above stated. A good example of the proper direction is, as was pointed out in argument in WOOLMINGTON'S CASE, [1935] A. C., at p. 467, that of Finlay, J., at the abortive trial.

(4) Our attention was called to the recent decision of the Court of Criminal Appeal in PRINCE, [1941] 28 Cr. App. R. 60, where the Court reduced the jury's verdict of murder to manslaughter on the ground that the trial Judge did not give a direction to the jury in accordance with WOOLMINGTON'S CASE (*supra*). PRINCE (*supra*) was a case in which the defence pleaded that there was provocation sufficient to reduce the charge to manslaughter. The Court of Criminal Appeal must have proceeded on the view that the jury were not adequately directed that reasonable doubt whether such provocation existed, as opposed to confident assurance that it did, was sufficient to require the milder view to be taken. There is no reason to repeat to the jury the warning as to reasonable doubt again and again, provided that the direction is plainly given.

(5) In WOOLMINGTON'S CASE, the sentence (25 Cr. App. R., at p. 96, [1935] A. C., at p. 482) quoted, which ends "the prisoner is entitled to be acquitted", should, of course, be understood as meaning "the prisoner is entitled to the benefit of the doubt". If the jury are left in reasonable doubt whether the act was "unintentional", that is, a pure accident without criminal negligence, the verdict should be Not Guilty. If they are left in reasonable doubt whether the act was "provoked", that is, perpetrated under the impulse of provocation as above defined, the prisoner should be found guilty of manslaughter.

My Lords, the House, in dealing with these unusual appeals in a criminal case, confines itself entirely to questions of law. The conclusion on the facts is for the jury, and the decision as to punishment rests elsewhere.

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There is no error of law in Macnaghten, J.'s summing-up which would justify the House in allowing the appeal and I, therefore, move that the appeal be dismissed.

VISCOUNT SANKEY: I entirely agree.

LORD RUSSELL OF KILLOWEN: I also agree.

LORD WRIGHT: I also agree.

LORD PORTER: I concur in the reasoning of, and the result arrived at by, the noble Lord on the Woolsack.

Appeal dismissed.

Solicitors: Addis, Edwards & Co., for appellant.

BEFORE

The LORD CHIEF JUSTICE, Mr. JUSTICE HUMPHREYS AND Mr. JUSTICE ASQUITH.

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EDGAR AUDLEY WATTAM.

Photograph—Gratuitous Reference by Police Officer—No Application for Discharge of Jury—Conviction not Vitiated.

During the trial of the appellant, a police officer, who was giving evidence identifying the appellant with a person seen by him at the time and place of the crime, stated in cross-examination that he had seen a number of photographs on the following day, including one of the appellant. The appellant had not then been arrested. No application was made by defending counsel that the jury should be discharged and the trial begun again.

Held, that the reference to a photograph of the appellant in the above circumstances was unlikely to affect the jury, and that, even if the mention of the photograph could be regarded as an irregularity, the conviction could not be interfered with in the absence of any application by defending counsel for the discharge of the jury and the commencement of a new trial.

PECKHAM [1935] (25 Cr. App. R. 125) and FIRTH [1938] (26 Cr. App. R. 148) followed and applied.

Appeal against conviction.

The appellant was convicted at Leeds Assizes on July 4, 1941, of shopbreaking and larceny and was sentenced by Croom-Johnson, J., to seven years' penal servitude.

During the trial of the appellant P.C. Harrop, who was giving evidence of having seen a man whom he identified as the appellant jump on to the running-board of a car outside the shop from which the property was stolen on the night of the theft (March 27, 1941), stated in cross-examination that he had seen photographs, including one

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of the appellant, on the following day. The appellant was not arrested till two months later. No application was made by counsel for the defence that the jury should be discharged and a new trial begun.

R. H. Blundell, for the appellant.
R. E. Seaton, for the Crown.

The LORD CHIEF JUSTICE [after referring to the facts:] It has been argued by counsel fully before us to-day that the trial was vitiated by reference being made by Police Constable Harrop in giving evidence to a photograph of the appellant, the question of identification being a critical question in the case. The reference to the photographs came out in the course of cross-examination of the police constable by counsel for the defence. Harrop was asked when he saw the man of whose face he caught a glimpse on March 27, 1941. The answer was: "When I looked at photographs produced to me at 10 a.m. on Friday, March 28." (Q) When did you see the face? (A) At the Court of summary jurisdiction. Two or three questions later he again mentioned the fact that he had seen a photograph of the appellant between June 10, 1940, and March 27, 1941, and thereupon counsel for the defence asked the witness to forget the photographs and to direct his attention to the question when he had last seen the appellant. That was all that was said about the photographs until the learned Judge came to sum up. There was no application by counsel for the defence immediately after Harrop had given his evidence that the jury should be discharged and a fresh trial begun; nothing more was said about it. When the learned Judge came to sum up, he mentioned while he was going through the evidence the answer given by Harrop as to having been shown some photographs, and then he gave a direction to the jury, which seems to us to be as clear and as emphatic as could possibly be the case. He said: "Remember that

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the suspicions of the policeman at Sheffield had been aroused on that night and that the next morning he was looking at a book of photographs to try and identify this man. You must not assume that he was looking at any kind of book of photographs. Books of photographs are supplied—I had a case only the other day—of perfectly respectable people and they are very often used for these purposes, and you must not assume that there is anything untoward in the policeman consulting a book of photographs. Let me be quite frank with you, you must not assume against the accused man that it was a book of photographs of convicted persons or known thieves or anything of that sort. Detective officers have their own methods of going to work and of trying to identify people ". As is well known, photographs are used, and can be properly used in proceedings. There is an improper way of using photographs, and there is a proper way of using photographs, and the learned Judge directs the jury in these clear terms that they must not assume that there was anything untoward in the fact that the police constable had seen the appellant's photograph in a book of photographs.

We are far from satisfied that the original mention of the photographs would have any effect at all upon the jury. A jury is probably much more likely to direct attention to the broad issues in the case than to any points like this point, which might appeal to a person versed in the practice of criminal Courts, but would not be so obvious to a juryman; but whether or not the mention of a photograph had any effect on the mind of a juryman, the learned Judge did everything to correct any improper inferences.

We have been referred to FIRTH [1938] 26 Cr. App. R. 148, and to an earlier case of PECKHAM [1935] 25 Cr. App. R. 125, with regard to the proper procedure to be followed where evidence has been wrongly admitted. In FIRTH (*supra*) it was laid down that there are three elements which must be found in a case before the Court of Criminal Appeal will

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quash a conviction obtained after the receipt of evidence which was irregular. The learned Lord Chief Justice (Lord Hewart) said (at p. 153): "There are evidently three elements: (1) a statement with regard to a prisoner's previous record or of that kind inadvertently made from the witness-box; (2) the statement must be to the prejudice of the prisoner; and (3) an application by the prisoner's counsel for the trial to be begun again before another jury". That was only repeating what was said by the Court in the case of PECKHAM (*supra*). In that case the Lord Chief Justice (Lord Hewart) twice stated the condition which is necessary to be satisfied, that an application by counsel for the prisoner for the trial to be begun again before another jury must be made. We should be going far beyond the decision in that case if we were to say in the circumstances of this case that the conviction must be quashed, and we think that this objection must fail.

[His Lordship then dealt with other matters raised in the appeal, and stated that in the opinion of the Court the appeal must be dismissed.]

Appeal dismissed.

BEFORE

The LORD CHIEF JUSTICE, Mr. JUSTICE HUMPHREYS AND Mr. JUSTICE LEWIS.

1941.
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LESLIE WALTER HAMMOND.

Evidence — Confession — Admissibility — Cross-examination on Truth of Confession—Relevancy as to Credit—Time when Objection to Admissibility of Evidence should be Taken.

An objection having been taken by counsel for the defence to the admissibility of a confession by the prisoner, the prisoner gave evidence before the Judge on the issue of admissibility. He was asked in cross-examination by counsel for the Crown whether the statement which he had made was true.

Held, that the question was relevant and admissible, because it went to the credit of the witness.

Where objection is going to be taken by counsel for the defence to the admissibility of a piece of evidence, he should inform counsel for the prosecution beforehand, and counsel for the prosecution should refrain from mentioning that piece of evidence to the jury in his opening. As a general rule a Judge should not hear in advance arguments as to the admissibility of evidence, though there may be cases in which such a practice is convenient and unobjectionable.

COLE [1941] (28 Cr. App. R. 41) approved.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on September 22, 1941, of the murder of George Roberts, and was sentenced by Cassels, J., to death.

In opening the case counsel for the prosecution stated that the appellant had made a statement amounting to a confession of the crime to the police and that he proposed to relate the circumstances in which the statement had been

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made. Defending counsel said that he intended to object to the admissibility of the statement, and the Judge then heard evidence as to its admissibility in the absence of the jury. After the evidence of the police the appellant went into the witness-box and said that the confession had been extorted from him by violence and ill-treatment on the part of the police. Counsel for the Crown then cross-examined the appellant as follows: "Q.—Your case is that this statement was not made voluntarily? A.—Yes. Q.—Is it true? A.—Yes." Counsel put further questions in order to ensure that the appellant understood what he was saying. After hearing all the evidence on the preliminary issue, Cassels, J., ruled that the statement was voluntary and admissible, and it was subsequently put in evidence at the trial before the jury. The statement described in great detail how the appellant had committed the crime and included a number of matters which were proved to be unknown to the police.

The appellant did not give evidence before the jury.

B. H. Waddy, for the appellant:

The cross-examination of the appellant as to the truth of the alleged confession was inadmissible.

G. B. McClure, for the Crown, was not called on.

HUMPHREYS, J. [after stating the facts:] Counsel for the prosecution had started his opening, had stated a few facts to the jury, and was proposing to explain to the jury the circumstances in which this complete confession had been made by the appellant, when counsel for the defence informed him that there would be an objection to the admissibility of the confession. The ordinary practice in such a case, if there is any objection on the part of counsel for the defence to the admissibility of a piece of evidence, is that he should inform the prosecution of that fact beforehand, and that that piece of evidence should not be opened to the

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jury. This Court desires to reiterate what was said by this Court in COLE [1941] 28 Cr. App. R. 41, that this is a good practice and should be adhered to, certainly in most cases. The Court cannot lay down as a rule of practice that in no case should the Judge decide to hear in advance arguments as to the admissibility of evidence. There may be cases in which it is convenient, and in which no harm can result. The rule stands, however, that in most cases the ordinary practice should be adhered to, and in this case there is no question but that it would have been very much better if it had been followed. Counsel for the prosecution could have opened the facts of the murder, and various other matters, medical evidence and so forth, and then simply have told the jury that there was some other vital evidence which he was not in a position to mention to them at the moment, but that it would be tendered in evidence at the proper time.

The jury were sent away with the consent of counsel for the defence, and the issue of admissibility was argued before the Judge on evidence which was properly called. Three police officers gave evidence of the completely voluntary nature of the statement, and of its being a statement which was not even the result of questions being put but being just what the appellant wanted to say, and nothing more. The appellant then went into the witness-box and gave his story to the Judge, who, for this purpose, was the tribunal of fact as well as law, having to decide whether or not this was a voluntary statement. The appellant said that he had been knocked about and brutally ill-treated, that his arms had been twisted and his face slapped, and that the confession had been extorted from him by what everybody would agree, if it took place, was most abominable conduct on the part of these three senior officers, and would clearly render the statement inadmissible. He was then cross-examined by counsel for the Crown, and this Court accepts counsel's statement that he had not the least idea, when he began to cross-examine the appellant, that, if he was asked the

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question, he would confess to the crime. The first question —in our view a perfectly natural question to put—was: Your case is that this statement was not made voluntarily? A.—Yes. Q.—Is it true? Then, no doubt to the surprise of counsel, the answer was: Yes, sir. Then two or three times in two or three different ways counsel put questions to the witness to make quite sure that he really meant that the confession was true, and that there was no mistake about the matter. Finally, the appellant was asked: "What you are now saying is that you were forced into saying what was true by something that was done. Is that right? A.—Yes, sir. Q.—So you did kill Mr. Roberts? A.—Yes, sir." Naturally after that counsel put no more questions.

Then the jury, not knowing anything of what happened while they were out of Court, had the confession read to them as part of the case for the prosecution, and the appellant did not take the opportunity of going into the witness-box on the general issue. The jury convicted the appellant, as they were bound to do on the evidence.

This appeal is brought on the sole ground that the question which was put by counsel for the prosecution to the appellant in cross-examination was inadmissible. In our view it clearly was not inadmissible. It was a perfectly natural question to put, and was relevant to the issue whether the story which the appellant was then telling of being attacked and ill-used by the police was true or false. It was put by the Lord Chief Justice in the early part of the argument of counsel for the appellant, that it surely must be admissible because it went to the credit of the person who was giving evidence. If a man says, "I was forced to tell the story, I was made to say this, that and the other", it must be relevant to know whether he was made to tell the truth or whether he was made to say a number of things which were untrue. In other words, in our view, the contents of the statement which he admittedly made and signed

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were relevant to the question of how he came to make and sign that statement, and, therefore, the questions which were put were properly put. They were admissible, and they could not, therefore, have wrongly affected the mind of the Judge.

The facts of this case go even further, for it is clear from the statement made by Cassels, J., the presiding Judge, that he did not decide on the admissibility of this confession as the result of the admission of the appellant that it was a true confession. He himself had some doubt whether or not the question as to its truth was a desirable question to put, and he said: "I had almost said that it was unnecessary to put the statement in detail. I have listened to everything the prisoner had to say in his evidence-in-chief. I hold that this statement is a voluntary statement and admissible in evidence."

We cannot entertain the smallest doubt that the appellant was rightly convicted upon evidence which was properly before the jury. Further, we are satisfied that the evidence of his confession of the crime was rightly admitted by the Judge, who was in no way misled by anything which took place. The appeal is dismissed.

Appeal dismissed.

BEFORE

The LORD CHIEF JUSTICE, Mr. JUSTICE HUMPHREYS AND Mr. JUSTICE LEWIS.

HARRY BURTON.

1941.
3 *November.*

Sentence—Observations by Police with regard to other Offences—No Charges Made—No Opportunity of having Alleged Offences Taken into Consideration—Reference by Judge to Alleged False Evidence by Prisoner's Wife—Sentence Reduced.

Sentence reduced in a case where a police officer, in giving evidence of the prisoner's record, had referred to other alleged offences, in respect of which no charge had been made and no opportunity given to the prisoner of having them taken into consideration, and where also the Judge had referred to alleged false evidence on the part of the prisoner's wife.

Appeal against sentence.

The appellant was convicted at the County of London Sessions on July 15, 1941, of receiving stolen property and was sentenced by the deputy-chairman to eighteen months' imprisonment with hard labour.

H. V. Lloyd-Jones, for the appellant.

No counsel appeared for the Crown.

HUMPHREYS, J.: The appellant was convicted at the London Sessions on charges of receiving stolen property knowing it to have been stolen. The case was undoubtedly a bad one, because the appellant was employed by a railway company and had abused the confidence placed in him, and had on two occasions acted the very dangerous part of receiver of property stolen by another railway employee. The sentence was a substantial one even for such a case, in

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view of the fact that the appellant had been employed for twenty-three years at the same place and had always borne an irreproachable character.

There are two matters to which our attention has been directed. The first is that, the police officer in charge of the case having said with perfect fairness that there was no previous conviction and nothing else which he thought it right to mention to the Court, a police officer employed by the railway company was called, who gave this very improper evidence: "The police inquiries have proved definitely that the prisoner Burton has been responsible for the losses which have taken place owing to stealing on the railway." In our opinion, that was a most improper statement to make. Either the police could prove that statement, in which case they ought to have prosecuted the appellant, or at least have given him an opportunity of asking for those offences to be taken into consideration, or they could not, in which case they ought not to have invited the presiding Judge to increase the appellant's sentence in respect of felonies with which he had never been charged, and therefore had never had an opportunity of disproving. Nothing was said by the learned deputy-chairman to indicate whether he accepted that evidence or not, but the statement which he made to a co-defendant of the appellant makes it appear not unlikely that he did take that matter into consideration, because he dealt with the co-defendant in a very different way.

Another matter which was a little unfortunate was that the learned deputy-chairman, in sentencing the appellant and his co-defendant, made reference to the fact that the appellant's wife had given evidence that some of the property had been bought by her in various places, evidence which was undoubtedly untrue, and, in sentencing the co-defendant, he observed that it was very much in his favour that he did not put his wife into the box to commit perjury. If that meant that the deputy-chairman assumed without

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evidence that the false evidence given by the appellant's wife had been suggested to her by her husband, the observation was unfortunate.

Taking the whole of the circumstances into consideration, and by no means regarding this as other than a serious case, the Court considers that the sentence of eighteen months' hard labour should be reduced, and we reduce it to a sentence of nine months' hard labour.

Sentence reduced.

BEFORE

The LORD CHIEF JUSTICE, Mr. JUSTICE HUMPHREYS AND Mr. JUSTICE WROTTESLEY.

1941.
17 *November.*

GERTRUDE ANNE TARBOTTON.

Sentence—Borstal Detention—Not to be Passed where Recommendation that Prisoner is not Suitable — Breach of Recognisance — Court of Summary Jurisdiction to be Informed of Pending Proceedings before Superior Court—Practice to be Followed.

A sentence of detention in a Borstal institution should not be passed where there is a recommendation by the Borstal authorities that the offender is not suitable for such treatment.

Where a Court of summary jurisdiction is dealing with an offender, the Court should be informed of any pending proceedings in a superior Court against the same offender for a breach of recognisance. The proper course then is for the Court of summary jurisdiction to communicate with the superior Court and inquire whether that Court desires that the breach of recognisance should be taken into consideration by the Court of summary jurisdiction in passing sentence, and, if the superior Court does agree, to act accordingly.

The Court of Criminal Appeal does not approve of the offender in such a case being sentenced by the Court of summary jurisdiction without any regard being had to the pending proceedings for breach of recognisance, and then being brought up out of prison to receive a further sentence in respect of the breach.

Appeal against sentence.

The appellant was convicted on November 5, 1940, at the County of London Sessions of obtaining goods by false pretences and was bound over for two years. On June 23, 1941, she was convicted at Westminster Police Court of obtaining goods by false pretences and was sentenced to six months' imprisonment. On August 20, 1941, she was brought up before the London Sessions in respect of a breach of her

recognisance, and was then sentenced to detention in a Borstal institution for a period not exceeding three years. She was at that date twenty-one years of age.

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No counsel appeared on either side.

HUMPHREYS, J. [after stating the facts:] This Court is informed, as indeed the Court of quarter sessions was informed in August last, that the appellant was considered unsuitable for Borstal detention, and she was considered unsuitable for any further term of probation. The Court is disposed to alter the sentence of Borstal detention, since it is always inadvisable to send a person to Borstal detention when the authorities of that institution, represented by the Governor of the prison in which he or she is, recommend that he or she is not suitable for Borstal treatment. The Court, having considered all the circumstances of the case, has come to the conclusion that a term of imprisonment to follow that which she is at present serving is the proper way in which to deal with the appellant. The sentence of detention in a Borstal institution will be altered to a sentence of six months' imprisonment, and that sentence will commence at the conclusion of the sentence which she is now serving.

There is one other matter to which we desire to draw attention. This is one of several cases which have been before the Court from time to time of a person who is serving a sentence being taken from prison in order to be charged with a breach of recognisance and then being sentenced to some further term of imprisonment. The Court lays great stress on the importance of a person who is sentenced to imprisonment knowing that when he has served that term he will come out with a clean sheet, and the Court does not approve of a person who is serving a sentence being taken away and sentenced to some other term for an offence which was committed long before the one for which he is then serving a sentence.

In this case, when the appellant was before the learned

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magistrate at Westminster Police Court, he was told that she had been put on recognisance at the London Sessions on November 5, 1940, and that she had broken that recognisance, and the magistrate was asked to take that into consideration. He said, and we are far from suggesting that he was wrong in saying, that according to the existing practice he could not take that into consideration, because it was a matter which was dealt with by a superior Court, namely, quarter sessions. Therefore he paid no attention to it.

What might have been done, and what this Court recommends should be done in future cases, is that in those circumstances the magistrate at the Court of summary jurisdiction should be informed of the pending case of breach of recognisance, and should communicate with the Court which is seised of the matter, and inquire whether that Court desires him to take into consideration in his sentence the breach of the recognisance. If that had been done in this case, we think that the learned magistrate, instead of sentencing the appellant to six months' imprisonment, might well have sentenced her to twelve months' imprisonment, as he had power to do. That will be the effect of the sentence we pass to-day, and we hope that that practice will be followed in future. It is quite true that, if a Court of summary jurisdiction applies to a superior Court for permission to take into consideration a breach of a recognisance, and is told that the superior Court does not approve of the course, nothing further can be done, but in most cases it will probably be found that the Court of quarter sessions or assizes will be only too glad that the whole matter should be dealt with by any other Court which has the case of the individual under consideration.

Sentence varied.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE ASQUITH.

WILLIAM SHAKESPEARE CLEAL.

1941.
10 & 11 *Dec.*

Summing-up—Sexual Offence—Child—Warning on Corroboration Sufficient—Failure to Refer to Passages in Child's Evidence Casting Doubt on Identification—Conviction Quashed.

The appellant was convicted of indecent assault on a young boy, whose evidence at the trial was uncorroborated. The summing-up dealt with the danger of convicting on the uncorroborated evidence of the boy, and contained a warning which, though not in the clearest terms, was held by the Court to be sufficient. It omitted, however, to refer to passages in the boy's evidence pointing to his identification of the appellant with the person who committed the offence as not being entirely satisfactory.

Held, that, in view of the above omission, the conviction must be quashed.

Appeal against conviction.

The appellant was convicted at Gloucestershire Quarter Sessions on October 16, 1941, of indecent assault on a boy aged ten and was sentenced by the Chairman to twelve months' imprisonment with hard labour.

The following statement of facts is taken from the judgment:

On Friday, September 5, 1941, a boy of ten was waiting outside the office of the *Gloucester Echo* in Cheltenham when a man whom the boy had never seen before spoke to him. The man asked the boy if he would like to go to the pictures and, after some conversation, took the boy for a walk up a road to a seat where they sat side by side, and the man showed the boy a badge which he was wearing underneath the lapel of his coat. The badge was a "Rotol" badge, that is to say, a badge bearing the name of that factory

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and issued by that factory to workers employed there. Then the man suggested that they should go to the lavatory, and there was evidence by the boy of acts of gross indecency done to the boy by the man there. Just before the boy left, the man said: "Meet me outside the Gaumont Picture House at 2 o'clock to-morrow". They then parted, the man saying he had to catch a bus. The boy noticed that the time according to the clock by the *Gloucester Echo* Office was just before 6.30 p.m.

The boy made a communication to his parents that night, and the next morning, Saturday, made a fuller communication in consequence of which the police were informed. The boy was instructed to keep the appointment at 2 p.m. at the Gaumont Picture House to identify the man, and was informed that a detective would be there. The boy gave a description of the man and how he was dressed, which was endorsed on the warrant which the police obtained. The boy went to the appointed place just before 2 p.m. and a detective officer in plain clothes, who was known by the boy to be there, kept observation from a distance some ten to fifteen yards away. The boy knew that he was going to this place with a detective to find the man.

According to the boy, at about 10 minutes past 2 the appellant came up and spoke to him saying: "So you have turned up. Does anybody know you are here?" This was denied by the appellant, who said that the boy spoke to him. The detective's evidence was that he saw the appellant speak to the boy and then saw them talking together, and that he followed them as they went towards the queue rails and heard the appellant say: "Does anyone know you are here?", and then informed the man of the warrant and asked him to come to the station. Immediately on the intervention of the detective, it was common ground that the appellant said: "I have never seen the boy before."

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The appellant called three witnesses employed at the Rotol works with a view to proving, as he swore himself, that on the Friday evening in question he was at the club in the Rotol works from about 5.55 p.m. until he went in to his work at between 7.30 and 7.45 p.m. Only one of the witneses gave evidence which covered the period in question. There was no contest whether the acts of indecency had in fact been committed on the Friday night. The whole contest was whether the appellant was the man who committed them. Identification of the appellant as the man who had been guilty of the acts of indecency towards him depended entirely on the evidence of the boy.

R. F. Lyne, for the appellant.
S. R. Benson, for the Crown.

Cur. adv. vult.

December 11.—The following judgment was read by

HILBERY, J. [after stating the facts] : At the close of the evidence for the prosecution and the defence, it was conceded by the prosecution that there was no corroboration of the boy's evidence, and in the argument before us it was again so conceded. *Ex concessis* the case was, therefore, one which depended on the uncorroborated evidence of the boy, since that was the only evidence identifying the appellant as the man who had committed the indecent acts.

The attention of the Chairman of Quarter Sessions was called to BASKERVILLE, 12 Cr. App. R. 81; [1916] 2 K. B. 658, and it was submitted that it was a case that should be withdrawn from the jury. The Chairman's reply was in these terms: "I am prepared to go this far: assuming I sum up to the jury directly, I will tell them of the need to be very careful in this case, and I will tell them that if, in spite of that warning, they are of the opinion that the sworn evidence given by the boy is true in fact, and they find a

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verdict of guilty, the conviction could be quashed on the ground that there was no corroboration. I am prepared to go as far as that." Then, when the actual report of BASKERVILLE (*supra*) was read, it was submitted that the jury should be directed to return a verdict of not guilty. The Chairman declined to take this course.

Now in all cases of this kind, where the evidence of a child upon which the whole case for the prosecution depends is without corroboration, the position as defined by BASKERVILLE (*supra*), and restated by this Court in BEEBE, [1919] Cr. App. R. 22, is this. It is for the Court, first, to tell the jury that it is within their legal province to convict upon such uncorroborated evidence; secondly, and this is a rule to be observed and applied in all cases, to warn the jury of the danger of convicting a person on the uncorroborated testimony of the boy; and, thirdly, in the exercise of its discretion, to advise the jury not to convict. This last is something which the Court may do, but is not bound to do. And lastly, "This Court, in the exercise of its powers, will quash a conviction even when the Judge has given to the jury the warning or advice above mentioned if this Court, after considering all the circumstances of the case, thinks the verdict unreasonable, or that it cannot be supported having regard to the evidence." In the exercise of his discretion, the Chairman declined to advise the jury not to convict. Having regard to certain passages in the boy's evidence to which I will more fully allude, it was a case where he would have been fully justified in directing them to return a verdict of not guilty. Whether he so advised and directed the jury or not was, however, in his discretion, and it is not a case where it is possible to say that the discretion could not judicially have been exercised as in fact it was. The Chairman did direct the jury that, as the child had been sworn, it was legally open to them to convict, though the child's evidence was uncorroborated.

The case, therefore, was one in which it was of the utmost importance that the rule that the jury should be warned of the danger of convicting on the uncorroborated evidence of the little boy should be complied with, and it was one where the warning needed to be given in such terms as could leave no possible doubt in the minds of the jury as to its import. If, as was the case, the boy's evidence of identification had been confessedly uncertain and on the application of more than one test his powers of observation had been shown to be unreliable, it was a case which, if left to the jury as an open matter at all, required a summing-up which would recall to the minds of the jury these important features of the boy's evidence.

Now the warning which the learned Chairman gave was certainly not in such terms as must necessarily have conveyed to the jury with perfect clarity its true import. What he said was: "In this case the law says that you can, if you wish, convict a person on the evidence of the boy, but I must warn you that in these cases where, as a rule, the alleged victim is a child of tender years, the jury must be very careful to weigh the evidence given by the boy, together with any other evidence that is material, before they can be satisfied that the person accused of the offence has, on the evidence of the boy alone, been guilty of it."

In the light of what the learned Chairman had said before in the hearing of the jury, which I have already quoted, when the submission on behalf of the defence was made, it is not possible to be sure that this conveyed clearly to the jury that they were being warned against the danger of convicting on the uncorroborated testimony of the boy, because of the possible injustice which might thus be done. The jury may indeed have thought that they were being warned that, if they convicted, the conviction was in danger of being quashed by the Court of Criminal Appeal. They must certainly have understood that they were being called

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on to take extra care. It is by no means certain, however, that they understood what such a warning properly given should convey, namely, that they would be entitled to return a verdict of guilty only if the boy's evidence carried such certainty to their minds that they were prepared to take the responsibility of convicting notwithstanding the warning. None the less, on the whole, it is not possible to say that the warning as given was so defective as to be insufficient.

Treating the warning as sufficient, when we turn to the summing-up, the omissions are such as, in our view, in the particular circumstances of this case, amount to misdirection. The boy's powers of observation and recollection had been shown to be imperfect. He described the man in question as having brown, wavy hair. The detective admitted that the appellant's hair was not brown. We saw the appellant. His hair could not be mistaken for brown. It was iron grey. The boy said the appellant had on a navy blue suit, such a blue as a police constable's uniform. It was established that the appellant had on a grey suit, the same suit as that in which he appeared before the jury. Again, when the boy was asked what the detective was wearing when he was waiting outside the Gaumont Cinema a few yards from the boy, the boy was quite unable to recollect, except that he was sure the detective was carrying over his arm a mackintosh coat. The detective deposed that he was not carrying any coat.

On the crucial question whether the boy's identification could be considered completely convincing, in his evidence the boy said he went to the picture house to look for someone wearing a " Rotol " badge, that he told the police that the man in question had a " Rotol " badge and had been told by the police that he would be able to see the " Rotol " badge. The boy went on to say that he looked to see if the man he met had a " Rotol " badge and, after seeing he had one, felt sure it was the man to whom he had

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spoken the night before. Of itself that was highly important as showing that the identification by the boy might well be regarded as largely dependent upon the fact that the man was wearing a "Rotol" badge. But there was evidence that Rotol employed 1,500 men or thereabouts, all of whom wore "Rotol" badges to admit them to the works. The boy's identification by means of the badge was therefore very unsatisfactory identification of the individual man. No allusion was, however, made to any of these matters in the summing-up.

When the boy was asked as a last question in cross-examination: "Do you think you may have made a mistake about this man and it may have been another man?", he answered: "Yes, Sir, I might". The second question in the boy's re-examination was as follows: "Did you go to look for this man, or did you go to look for a man who was wearing a 'Rotol' badge?—(A.) I was looking for a man wearing a 'Rotol' badge." Now those admissions by the boy were vital matters for the jury to have in mind, where the whole case depended on whether the identification by the boy could be so certainly relied upon and could be said to carry such certainty that the jury would be justified in convicting notwithstanding the warning against the danger of returning a verdict of guilty. In our view, more especially when it is remembered that the boy gave his evidence on one day and the summing-up was not given until late in the afternoon of the next, it was necessary that those passages in the boy's evidence should be called to the attention of the jury. If they had been, it is unlikely that the jury would have convicted. To omit any reference to those passages was, in our view, misdirection, having regard to the particular circumstances of the case. For these reasons we were of opinion that the conviction should be quashed.

Conviction quashed.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE WROTTESLEY AND MR. JUSTICE CROOM-JOHNSON.

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FREDERICK THOMAS ROBERTS.

Murder—Defence of Accident—Issue of Manslaughter Withdrawn from Jury—Verdict of Manslaughter Substituted—Statement by Prisoner Subsequent to Killing on Nature of Intended Defence—Admissibility.

The appellant had been told by a girl with whom he had been associating that she wished to end the association. He went to a house where she was, taking with him a Service rifle of which he was lawfully in possession. A witness for the prosecution heard a shot fired and found the girl lying in the passage of the house and the appellant standing outside with the rifle in his hand. The appellant was charged with the murder of the girl, and at the trial put forward the defence that the discharge of the rifle had been accidental. It was conceded that no question of provocation arose. The Judge directed the jury that they must either convict of murder or return a verdict of not guilty.

Held, that, as the jury might have found on the evidence that the death of the girl had resulted from the doing of a highly dangerous act by the appellant in the handling of the rifle, a verdict of manslaughter was open to the jury, and that the jury should have been directed accordingly, and that in the circumstances a verdict of manslaughter should be substituted.

HUGHES (1857), 7 Cox C. C. 301, applied.

The defence desired to call the appellant's father at the trial to prove that, subsequent to the killing, the appellant had made a statement to him with regard to the nature of the defence on which he intended to rely. The Judge ruled that the evidence was inadmissible.

Held, that the Judge's ruling was right, the evidence being in the circumstances irrelevant. Such a statement would have been admissible only if it had been made at the time of the killing, as a statement explaining the act, or if there had been cross-examination of the appellant suggesting

that his defence was being put forward for the first time at the trial.

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Appeal against conviction.

The appellant was convicted at Hampshire Assizes on December 9, 1941, of the murder by shooting of Nina Eileen Wood and was sentenced by Singleton, J., to death.

At the trial evidence was given by the prosecution that the appellant, who was twenty-five years of age, had been associating for some time with Nina Eileen Wood, who was aged seventeen; that in September, 1941, she had discontinued the association and started to associate with another man; that on the evening of September 21 the appellant went to a house where she was, and she came out and spoke to him at the front door; that a person who was in the house heard a shot, and found the girl lying in the passage of the house and the appellant standing outside with a rifle in his hand. The defence raised at the trial was that of accident, the appellant stating that, after a quarrel with the girl, he had taken the rifle, of which he was lawfully in possession as a member of the Home Guard, to the house to frighten her, and that he loaded it in her presence and on her refusing to speak to him, he jerked the rifle forward, intending to catch it at the point of balance for the " short trail " position, when it went off accidentally.

At the trial the Judge ruled that the evidence of the appellant's father of a statement made to him by the appellant while in custody with regard to the nature of the appellant's intended defence was inadmissible.

On the application of the appellant, the Court allowed further evidence to be called. Two witnesses named Jeffery deposed as to statements made by the appellant within a minute of the shooting.

J. D. Casswell, K.C., and *A. C. Munro Kerr*, for the appellant:

The learned Judge was wrong in law in refusing to admit

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evidence of the appellant's father as to a statement made to him by the appellant shortly after the appellant had been taken into custody. The appellant had been asked in cross-examination why he had not told the story he was now putting forward to the police officer who arrested him. This rendered the statement made to the father admissible so that the appellant could show that he had already stated that the shooting was accidental. Further, great reliance had been placed by the prosecution upon other statements alleged to have been made by the appellant after the shooting, and, therefore, the statement to the father should have been admitted.

The learned Judge was wrong in withdrawing manslaughter from the jury. Counsel for the defence had submitted at the trial that there were three possible verdicts, namely, guilty of murder, guilty of manslaughter, and not guilty. On a certain view of the facts manslaughter was quite a possible verdict, and the Judge ought to have directed the jury that they could find the appellant guilty of manslaughter. The appellant was entitled to have the lesser verdict left to the jury and in the circumstances it is submitted that the Court should substitute that lesser verdict. [They referred to WESTON (1879), 14 Cox C. C. 346; HUGHES (1857), 7 Cox C. C. 301; CAMPBELL (1869), 11 Cox C. C. 323; SKEET (1866), 4 F. & F. 931, and PRINCE (1941), 28 Cr. App. R. 60.]

J. G. Trapnell, K.C., and *J. F. F. Platts Mills*, for the Crown (who were called on to argue only on the necessity for a direction on manslaughter):

The facts of the case were such that there was no evidence justifying the Judge in leaving the issue of manslaughter to the jury. Moreover, even if that issue had been left to them, the jury must, in view of the evidence, have returned a verdict of guilty of murder none the less. In any event, even if the Judge was wrong in failing to

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direct the jury on manslaughter, there was no substantial miscarriage of justice, and the Court is asked to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

HUMPHREYS, J. [after reviewing the evidence and stating that, in the opinion of the Court, there was ample evidence on which, on a proper direction, the jury were entitled to convict the appellant of murder, and that there was no substance in certain complaints of alleged misdirection]: The second ground of appeal is: "that the learned Judge was wrong in law in refusing to admit the evidence of the appellant's father as to the statement made to him by the appellant after his arrest". That relates to a statement alleged to have been made by the appellant to his father after his arrest and while he was in custody. The father was called as a witness by the defence. In the opinion of the Court the Judge was right in refusing to admit that evidence, which was in law inadmissible. It might have been, and perhaps by some Judges would have been, admitted on the ground that it was harmless and that there was no strenuous opposition by the prosecution. The Judge was, however, absolutely entitled to take the view that that evidence was inadmissible in law.

The law on the matter is well settled. The rule is sometimes expressed as being that a party is not permitted to make evidence for himself. That applies to civil as well as criminal cases. For instance, if A and B enter into an oral contract and some time afterwards litigation arises about an actual term agreed on, A would not be permitted to call his partner to say that a day or two afterwards A had told him his view of the contract and that he had agreed to do this or that. So, in a criminal case an accused person is not permitted to call evidence to show that, after he had been charged with an offence, he told a number of persons what his defence was going to be. The reason for the rule appears to the Court to be that the evidential value

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of such testimony is *nil*. Because it does not assist in the elucidation of the matters in dispute, it is said to be inadmissible as being irrelevant. It would not have helped the jury in this case in the least to be told that the appellant said to a number of persons whom he saw while he was awaiting his trial, while in custody or on bail, that his defence was this, that or the other. The evidence was properly refused. Of course, it would have been a totally different matter if the statement had been made to the father just at the time of the shooting, because any statement accompanying an act has always been regarded as admissible so that it may explain the act. It was on that ground that the Court allowed the two witnesses Jeffery to give evidence, because their evidence was something said by the appellant contemporaneously or within a minute of the shooting, namely, how the shooting had come about, and so explaining that act. A statement to the father a little time afterwards was quite a different matter. There the appellant was merely saying what his defence to the charge was. Counsel for the appellant suggested that the statement might be admissible on the ground that it had been suggested to the appellant in cross-examination that he had recently concocted this story of accident. If any such question had been put, undeniably the evidence would have been admissible as showing that the story was not recently concocted because the appellant had told it on the very day the incident occurred. The answer is that Mr. Trapnell had put no such question to the appellant.

The important ground of appeal is that the Judge was wrong in law in holding that it was not open to the jury to return a verdict of manslaughter and in so directing them. Leading counsel for the appellant, in his address to the jury, submitted that there were three possible verdicts. Although he did not invite the jury to find his client guilty of manslaughter, since he was asking them to find him not guilty on the ground of accident, he did say that if they

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were unable to find him not guilty they should find him guilty of manslaughter. The Judge, in summing up, said that the case for the prosecution was that it was one of murder or nothing, and added: "And that, members of the jury, is my view of the case. You are responsible for all questions of fact. I have to direct you upon the law, and my view of this case is that, if the shooting was intentional and a deliberate shooting of the girl is proved, that amounts in law to murder. If that is not proved, if there be any real doubt of it, or if it was an accident, the verdict should be one of not guilty. You will bear in mind that Mr. Casswell himself, in his first address to you, said that no question of provocation arose here—nothing of that kind. He did suggest that there might be a middle course—that is, manslaughter—if there was proved to be some gross negligence on the part of the accused, but, as I have said to you already, I take the view, and direct you" —that means in law—"that if you come to the conclusion that the shooting was accidental—that is, if it is not proved that the shooting was deliberate—then your verdict ought to be one of not guilty, and not one of guilty of manslaughter."

In the opinion of the Court that was, and was understood to be, a direct and clear direction in law to the jury that it was open to them to return a verdict of murder or not guilty, and that it was not open to them to consider the question of manslaughter. The question whether that was a right direction is by no means easy. The law is quite clear. On any indictment for murder it is open to the jury to find a verdict of not guilty of murder but guilty of manslaughter if, and only if, there is evidence on which they can so find. If a jury find the facts proved which would constitute murder if there were in addition the malice which is the essential part of murder, but they negative the malice, it may be said, as a general proposition, that in such a case they may return a verdict of man-

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slaughter. Manslaughter is the unlawful killing of a person. Murder is the unlawful killing of a person with the addition of malice, which in such a case as this may be said to amount to an intention to kill or injure.

The matter was expressed very clearly in HUGHES (1857), 7 Cox C. C. 301, referred to in *Archbold's Criminal Pleading* (30th ed.). It is there stated (p. 902): "Where an act of omission or commission, in itself lawful, is at the same time dangerous, it must appear, in order to render an unintentional homicide from it excusable, that the party, whilst doing the act, acted without gross negligence, in that he used such a degree of caution as to make it improbable that any danger or injury should arise from it to others; if not, the homicide will be manslaughter at the least, the doctrine being well established that an act or omission arising from culpable neglect of duty and having a fatal result is manslaughter, and if done by design or of malice prepense would be murder."

The facts in HUGHES (*supra*) were as follows. The prisoner had, as part of his duty, to place a stage over the mouth of a shaft for persons working in a mine. He omitted to put the stage there, as the result of which a truck full of bricks fell into the shaft and killed somebody. The prisoner had done no unlawful act at all, but he had omitted to do what it was his duty to do. Watson, B., said (p. 302): "I left it to the jury whether the accident happened by the negligence of the prisoner, and whether that negligence arose from an act of omission or commission. They found that the death of deceased arose from negligent omission on the part of the prisoner in not putting the stage on the mouth of the shaft. Thereupon I directed a verdict of guilty." In giving the judgment of the Court for Crown Cases Reserved, Lord Campbell, C.J., used the language which I have just quoted from *Archbold's Criminal Pleading*, and added: "There is no authority for the position that without an act of commission there

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can be no manslaughter; and on the contrary, the general doctrine seems well established that what constitutes murder being by design and of malice prepense constitutes manslaughter when arising from culpable negligence."

Other authorities were cited to us, particularly WESTON (1879), 14 Cox C. C. 346, which is a very strong case. The prisoner stated that he had shot the deceased man in self-defence, because the man was attacking him and he was in fear of his life. The jury, however, negatived that, their answer to a question put to them being that in the circumstances the gun was unnecessarily levelled at the deceased, but they added, "without any intention of discharging it, and that it went off accidentally. Cockburn, C.J., said (p. 352): "That would amount to a verdict of manslaughter. Do you intend that?" The jury said "Yes". Then Cockburn, C.J., said: "On the ground that, though the prisoner had no intention of discharging the gun, yet that his levelling at the prisoner was, under the circumstances, unnecessary." I think we may substitute for the word "unnecessary" the word "unlawful", because levelling a gun at a person is unlawful.

In the present case the difficulty has arisen in the following way. The appellant was not at the trial asked any question about how the rifle came to be discharged at all. It has been agreed at the Bar that a Service rifle cannot go off of its own accord; it can do so only if a heavy blow is administered to it, or, possibly, through its being dropped on hard ground, or in the ordinary case by the pulling of the trigger. In this case neither of the first two things happened. *Ex concessis*, therefore, it was discharged by the placing of the appellant's finger on to the trigger. Whether that was so or not, does not appear because he was never asked whether his finger was on the trigger; we take it, however, that it must have been. His case was that if his finger was on the trigger it was so unintentionally.

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On those facts the question is whether a verdict of manslaughter was open to the jury. In our opinion, as a matter of law, it was. On the proved facts—by "proved" I mean that there was evidence on oath—the jury might have said that they were not satisfied that the prisoner intended to discharge the rifle, but that they did find that he was doing a highly dangerous act in loading the rifle, leaving the safety catch off, and throwing up the weapon in the way which he described, and that it was owing to that dangerous and negligent act that the deceased was killed. The Court is of opinion that that view was open to the jury as a matter of law, and a verdict returned in those terms would have amounted to one of manslaughter.

True, the Judge was acting, as he believed, in the interests of the prisoner in withdrawing manslaughter from the jury and directing them that, unless they were satisfied that this was a deliberate act, they ought to acquit him. Nevertheless, the prisoner was entitled as a matter of law to have the jury properly directed about the verdicts open to them. In the opinion of the Court they were misdirected because, the verdict of manslaughter being open to them as a matter of law, they were prevented from considering or returning it.

As for the question whether it was open to them on the facts, counsel for the prosecution has argued with good reason that no reasonable jury could come to such a conclusion. The Court may be disposed to take much the same view, but it cannot delve into the minds of the jury and say what they would have done if the issue had been left open to them. We are disposed to take the view that it is extremely unlikely that the jury would have returned a verdict of manslaughter, seeing that, as we know, they regarded the act as deliberate. But we cannot say that it is certain that the jury would have returned a verdict of murder if manslaughter had been left open to them. In PRINCE (1941), 28 Cr. App. R. 60, a very slight misdirection,

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or an omission of a direction, had occurred in the summing-up, and in that case Lord Caldecote, C.J., in giving the judgment of this Court, said (at p. 64): "The direction being, in our view, insufficient, we think it impossible that the verdict of murder should stand." There the Court thought its duty was to apply section 5 (2) of the Criminal Appeal Act, 1907, which, in our view, is much more appropriate in the present case than it was in PRINCE (*supra*).

The decision of this Court accordingly is that the verdict of murder in this case cannot stand, and there will be substituted for it a verdict of manslaughter. We pass on the appellant a sentence of ten years' penal servitude.

Verdict and sentence substituted.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE ASQUITH AND MR. JUSTICE CASSELS.

ROBERT MOORE.

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Summing-up—Corroboration—Accomplice—Absence of Warning—Substantial Corroboration in Fact — Effect of Non-Direction.

Observations on the effect of the absence of any warning in a summing-up for the necessity of looking for corroboration of the evidence of an accomplice where there is in fact substantial corroboration.

TATE, 1 Cr. App. R. 39; [1908] 2 K. B. 680, and BASKERVILLE, 12 Cr. App. R. 81; [1916] 2 K. B. 658, referred to.

Application for leave to appeal against conviction.

The applicant was convicted at Middlesex Sessions on January 15, 1942, on an indictment containing eight counts

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charging him with obtaining money by false pretences, and was sentenced by the Chairman to three months' imprisonment and ordered to pay £50 towards the costs of the prosecution.

The following statement of facts is taken, in substance, from the judgment: Couchman & Sons, who were managers of, and collectors of rent upon, large estates, employed various firms of builders to do repairs. Among the firms employed was a firm of W. Moore & Sons, the partners in which were the applicant's father and three brothers. The applicant himself was works manager, and his duties included looking after the office business of the firm. The normal procedure was that Couchman & Sons gave orders in writing to the builders for repairs, of which a duplicate was kept in a book. When the builder had done the work, he made out his accounts and left them receipted at the office of Couchman & Sons, and later in the day collected his money in an envelope if his accounts were found to be in order and his charges reasonable. One Reginald Charles Smith was employed by Couchman & Sons, first as a rent collector, then as assistant manager and later as manager. Smith claimed to have been much overworked, with the result that he failed to observe the normal procedure. The order book was not kept, there were no duplicates of orders given to builders, orders were sent out on chits, and when the builders' accounts came in, there were no orders attached to them.

In March, 1941, a dispute arose between Couchman & Sons and Moore & Sons, with the result that the work of the latter for the former ceased. On investigation being made, it was alleged that between January, 1939, and February, 1941, the applicant had sent in accounts for 305 items involving £534, which he had been paid and for which he had given 290 receipts, and that none of the work involved in these accounts had been done. The applicant did not dispute that the work had not been done.

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The indictment, which contained eight counts, charged the obtaining of eight separate sums between February 2 and December 20, 1940. Evidence was given for the prosecution by Richard Seymour Couchman, a partner in the firm of Couchman & Sons, who said that he had paid out the money and put it into envelopes and that, if he did not hand each envelope to the applicant, Smith did. Evidence was given also by Smith, who said that he was practically certain that he paid the eight amounts referred to to the applicant. He admitted that he had been negligent in his work, particularly in not keeping duplicates of the orders and in not checking to see if orders had been given for the work for which the applicant was sending in accounts. The defence contended that Smith was a fraudulent person, who had been systematically robbing his employers and getting the applicant to make out receipted accounts for work on the pretence that he required duplicates for office and income tax purposes, and that the applicant had been throughout the dupe of Smith. The applicant gave evidence on his own behalf, in the course of which he said that he complied with Smith's request to give him copies of accounts and that, on the applicant's refusing to stamp them, Smith said that he would. The accounts produced were receipted and stamped where the amount was over £2. The applicant was unable to state the number of times that Smith had done this, but accepted from counsel for the prosecution that he had given Smith 300 duplicate receipts. The applicant could not produce any evidence in any book about these transactions.

The material parts of the summing-up are set out in the judgment.

John Flowers, K.C., and *Laurence Vine*, for the applicant:

Smith was to be regarded, on the whole of the evidence, as being in the position of accomplice. The summing-up

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should, therefore, have contained a warning on the danger of convicting on Smith's uncorroborated evidence, but no such warning was given.

No counsel appeared for the Crown.

CASSELS, J. [after stating the facts]: Complaint is now made that the summing-up contained no warning to the jury about the danger of convicting upon the uncorroborated evidence of an accomplice. It is true to say that there was no such warning in so many terms. The case for the applicant was that the applicant's conduct was that of an innocent man and that Smith was the sole offender, that Smith's was the fraudulent system, that it was he who had obtained the money from his employers by his own false pretences and that the applicant had been his innocent dupe. In that respect, therefore, Smith could scarcely be called an accomplice of the applicant; he was certainly not admittedly an accomplice. But assuming that Smith and the applicant had combined together to carry out this system of fraud, the applicant providing the false receipts and Smith passing them through the office and obtaining the money, there was ample corroboration of Smith's evidence in the receipted accounts themselves, which were produced and were admittedly in the handwriting of the applicant. The jury may well have found it difficult to reconcile the making of so many of these receipts with the applicant's explanation that he was told that they were marked as duplicates for office and income tax purposes. None of this work had been done. Any business man upon the jury would think it very remarkable that a builder could put his hand to all these documents, which detailed work of which there was no record in his books, and be under the impression that they were for work which he had done and for which he had already been paid.

On corroboration reference may be made to the very well-known case of BASKERVILLE, 12 Cr. App. R. 81; [1916]

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2 K. B. 658, where Lord Reading, C.J., said (12 Cr. App. R., at p. 89; [1916] 2 K. B., at p. 665): "The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it." He had previously said (12 Cr. App. R., at p. 87; [1916] 2 K. B., at p. 663): "This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal Act came into operation this Court has held that, in the absence of such a warning by the Judge, the conviction must be quashed." Reference is made to TATE, 1 Cr. App. R. 39; [1908] 2 K. B. 680, and an extract from the judgment in that case delivered by Lord Alverstone, C.J. (1 Cr. App. R., at p. 41; [1908] 2 K. B., at p. 683) is cited. Bearing in mind that in that case the Court quashed the conviction because there was no warning, the passage is as follows: "We should not, however, have taken this view, notwithstanding the Judge's departure from the practice, if we thought that there was in fact substantial corroboration upon the evidence." That being so, where there is substantial corroboration, this Court will not interfere with the verdict of a jury because there has been in the summing-up no specific warning about the danger of acting upon the uncorroborated testimony of an accomplice.

It was further contended on behalf of the applicant that Smith's evidence at the trial differed from his evidence before the justices. There were some ticks on the false receipts, and it was suggested that at the police court Smith had said that the ticks indicated that he had checked the accounts with an order or chit, but that in his cross-examination at the trial he said he was speaking generally and was not referring to these particular receipts. Quite properly, comment was made in the cross-examination, and

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doubtless in the address by counsel for the defence to the jury, that there must have been somebody in the office who was producing fabricated orders. This point was left to the jury by the learned Chairman in terms favourable to the applicant. He undoubtedly took the view that Smith was participating in the fraud, for at the end of the whole case he said that he proposed to place the papers before the Director of Public Prosecutions. He left the case against and for the applicant clearly and fairly to the jury. I need read only one passage. After referring to the possibility of their both participating, he referred to the applicant and said: "As I say, do not convict him on suspicion; if you have any reasonable doubt in your minds, acquit him; and unless you are quite satisfied that he was and must have been acting fraudulently when he put forward those documents only then ought you to find him guilty. You will bear in mind that he is a man of good character, and let that weigh in your minds in the balance, if you think there is any doubt at all in the matter. You will look at the case as a whole, consider the whole of the evidence both for the prosecution and for the defence, and say whether in your view he is guilty or not guilty of any one or all of these frauds because they are all on the same lines."

The jury did convict. We see no reason to interfere, and this application for leave to appeal must be refused.

Application refused.

Solicitor—W. R. Pegden, for applicant.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE ASQUITH AND MR. JUSTICE HALLETT.

EVE NELLIE SNELLING.

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Receiving Stolen Goods—Guilty Knowledge—Rationed Goods—Suspicion Goods were Supplied in Breach of Rationing Order—Not Equivalent to Suspicion Goods were Stolen—Appropriate Penalty for Breach of Rationing Order.

A suspicion on the part of the defendant that goods have been supplied to him in breach of a rationing order is not necessarily equivalent to a suspicion that the goods were stolen.

Observations on the penalty appropriate for the breach of a rationing order.

Appeal against conviction and sentence.

The appellant was convicted on January 7, 1942, at Portsmouth Quarter Sessions on three counts of an indictment charging her with receiving articles of food knowing them to have been stolen, and also on a count charging her with obtaining an article of food in contravention of the Rationing Order, 1939. She was sentenced by the Recorder to twelve months' imprisonment in respect of the former offences and one day's imprisonment in respect of the latter offence.

The appellant was at the material time the secretary of a Mr. Spickernell, who was the owner of a furniture business in Lake Road, Portsmouth, and had been Lord Mayor of the city. One Mabel Kean was at the material time housekeeper and storekeeper at Portsmouth Infectious Diseases Hospital and in charge of the stores. She had pleaded guilty to stealing the three articles of food in respect of which the appellant was subsequently convicted, namely 2 lbs. of cheese, a quantity of suet, and six eggs,

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and was called as a witness by the prosecution. The material portions of the evidence appear in the judgment.

J. Scott Henderson, for the appellant:

There was no evidence of guilty knowledge on the part of the appellant. The goods were in every case supplied to her openly and she paid in every case full consideration for them. The thief, on whose evidence the prosecution relied, said that there was nothing in the transactions to arouse her suspicion. [He was stopped.]

C. Bray, for the Crown:

The appellant knew throughout that Mabel Kean was storekeeper at the Infectious Diseases Hospital, and the relative positions occupied by her and by the appellant must have suggested to the appellant that the goods had been stolen from the hospital. Secondly, so far at any rate as the cheese is concerned, the appellant must have known that she was receiving the goods in quantities in excess of that permitted by the Rationing Order, and that fact in itself must have been sufficient to arouse her suspicion that the goods were stolen.

ASQUITH, J.: The grounds of appeal have not all been argued. The first was a ground of alleged misdirection, and was based on the assumption that the direction contained in the summing-up in SCHAMA AND ABRAMOVITCH (1914), 11 Cr. App. R. 45, ought to be given to the jury in every case of receiving, an assumption to which this Court has often demurred. I need not pursue that matter, because that ground of appeal has not been argued.

The ground of substance which has been argued is that there was no evidence of knowledge on the part of the appellant that the articles of food had been stolen. The evidence on that point stands thus. The goods were supplied perfectly openly. The messengers were not sworn to secrecy. The parcels were delivered openly to the

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appellant. She did not receive them as gifts or buy them at an undervalue; she paid in every case full consideration, either in cash or in kind. In respect of the three material articles, she paid in cash for two of them at the same price as the hospital had given for them. With regard to the cheese, she had not paid for that, because she was arrested immediately after receiving it. Mabel Kean swore that there was nothing to suggest to the appellant that the goods were stolen. One must discount her evidence as that of a self-confessed criminal, but, for what it was worth, it was as follows: "(Q) Was there anything in the transactions between Miss Snelling and you that would lead her to suspect that you were stealing the goods you were sending her? (A) Nothing at all. (Q) Are you convinced in your own mind that she never had any suspicion that the goods you were sending her were stolen property? (A) I am absolutely convinced of that." It is possible that the appellant knew that some or one of these articles were or had been the property of the hospital, but there is not much evidence of that. It was suggested at the trial that the six eggs were marked I.D.H. (Infectious Diseases Hospital), but it appears now, as has been fairly pointed out by Mr. Bray for the prosecution, that they were marked M.O.F. (Ministry of Food), a marking which would not indicate anything in particular to anybody. Almost the only piece of evidence which suggests that the appellant knew the origin of any of the food which was sent to her was a carton in which a ham, which had also been sent to her, had been packed. That ham was the subject-matter of a charge of receiving on which she was acquitted.

The main argument for the Crown is that the relative positions of the storekeeper Mabel Kean and the appellant must have suggested to the appellant that these goods were stolen from the hospital, and secondly that, as these goods were being supplied, at any rate so far as the cheese is concerned, in quantities in excess of what the Rationing

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Order allows, that, too, should have engendered in her mind some suspicion. So far as the second ground is concerned, it does not appear to this Court that a suspicion that goods have been supplied in breach of a rationing order need suggest a further suspicion that they have been stolen. As regards the first argument, this was a case of a storekeeper of a hospital selling goods to somebody else. Might not the appellant well have supposed, even if she knew that these articles had originally belonged to the hospital, that the storekeeper had authority to dispose of surplus stores, or perishable stores, at her discretion, if she received proper payment for them? There seems to be nothing absurd in that supposition.

Regarding the case as a whole, the Court has come to the conclusion that the verdict, in so far as it assumed that the appellant had received these goods with knowledge that they were stolen as proved, is a verdict which cannot reasonably be supported and which cannot stand, and therefore the conviction on the three counts for receiving will be quashed.

The other count is not under appeal, but the Court thinks it fit and proper to add that, while the appellant should not have been convicted on the counts for receiving, she might reasonably have received a much more severe sentence than she did on the other count on which she was convicted, the count for the breach of the Rationing Order. In fact, she received a nominal sentence. Clearly, breaches of this type of war legislation ought to be visited with condign punishment at this time.

In the result the appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitors—Gordon Gardiner, Kearton & Co., agents for J. R. C. Miller, Portsmouth, for appellant.

BEFORE

Mr. JUSTICE HUMPHREYS, Mr. JUSTICE ASQUITH, AND Mr. JUSTICE HALLETT.

GEORGE KEELING.

1942.
10 *March.*

Evidence—Child—Unsworn Testimony—Corroboration—Conduct of Prisoner After Accusation.

The appellant was convicted of carnal knowledge of a girl of eight, whose testimony was given unsworn. When told by a police officer that he had a warrant for the appellant's arrest for the offence which he named, the appellant replied after being cautioned : " I know what you mean, but not likely." The same evening the warrant was again read to the appellant and, after again being cautioned, he replied : " I have got you; nothing to say." When before the committing justices, in answer to the statutory caution, he replied : " I am not guilty. I am going to say nothing ". The appellant did not give evidence at the trial. The Judge directed the jury that the necessary corroboration of the child's testimony could be found, if they thought proper to take that view, in the appellant's conduct from first to last after the accusation had been made against him.

Held, that some at least of the appellant's conduct, particularly his having said nothing except that he was not guilty in answer to the statutory caution when before the justices, could not in law be regarded as affording corroborative material for the jury, and that as it was impossible to say whether that part, if any, of the material which was admissible would have been sufficient to satisfy the jury, the conviction must be quashed.

WHITEHEAD [1928] (21 Cr. App. R. 23; [1929] 1 K. B. 99) followed.

FEIGENBAUM [1919] (14 Cr. App. R. 1; [1919] 1 K. B. 431) doubted.

Appeal against conviction and sentence.

The appellant was convicted at Leicester Assizes on

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January 28, 1942, of carnal knowledge of a girl of eight and was sentenced by Macnaghten, J., to three years' penal servitude.

At the trial the child gave her testimony unsworn. At the close of the case for the prosecution counsel for the defence submitted that there was no corroboration in law of her evidence, but the Judge overruled the submission. In his summing-up the Judge directed the jury that corroboration could be found, if they thought proper to take that view, in the appellant's conduct from first to last after the accusation had been made against him. The details of the appellant's conduct are set out in the judgment.

Guy Dixon, for the appellant.
A. P. Marshall, for the Crown.

The arguments appear sufficiently from the judgment.

HALLETT, J.—The medical evidence established, and indeed it was not disputed by counsel for the appellant at the trial, that someone had committed the offence in question on the little girl at or about the time when, according to her evidence, it was committed upon her by the appellant. Having regard to her age, however, she was not sworn, and accordingly the proviso to section 38 of the Children and Young Persons Act, 1933, rendered it not merely desirable, as in most sexual cases, but absolutely essential as a matter of law, that her evidence should be corroborated by some other material evidence implicating the appellant. At the close of the case for the prosecution, counsel for the appellant submitted to the Judge that there was no evidence available which the jury might regard as affording the necessary corroboration. That submission was overruled after some discussion, and in summing up the Judge, after giving the jury certain directions as to the necessity for corroboration, to which no exception has been

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or could be taken, directed them that there was the necessary corroboration to be found, if they thought proper to take that view, in the conduct of the appellant from first to last when the accusation in question was made against him.

The appellant's conduct falls to be considered at four stages, the circumstances of each being somewhat different. In the first place, on November 28, 1941, an inspector of the Leicester police force saw the appellant in a certain street and cautioned him in the usual way, that is to say, he told him that he was not bound to make any statement. The inspector then said that he had in his possession a warrant for the arrest of the appellant for having had carnal knowledge of the child in question on or about November 13 of that year. The appellant replied, " I know what you mean, but not likely. She plays with the Sawbridge girl ". That child gave evidence at the trial which carried the matter no farther. It was not suggested by counsel for the Crown, either here or in the Court below, nor by the Judge, that this reply amounted to an admission. The Judge did suggest, however, that the form which the denial took was inadequate having regard to the gravity of the charge being made. He thought that the jury might take the view that the words " not likely " were to be regarded in their ordinary sense, and he said: " It is not at all likely that anybody would do such a thing, but that is what he says." Another view of the words " not likely " would be that they were a colloquial way of giving an emphatic denial. However that may be, no one suggested that the words amounted to an admission, as distinct from what might be regarded as a weak and inadequate denial.

The next stage to be considered is when, on the same evening, the warrant was read over to the appellant by the inspector, and he was again cautioned. On that occasion, having been told that he need say nothing, he answered, " I have got you; nothing to say ". In other words, he

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availed himself of the information that he was under no obligation to say anything.

The third stage occurred at the hearing before the justices, when the appellant was, of course, cautioned in the manner provided by statute, being addressed to the following effect: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence at your trial". To that the appellant's answer was, "I am not guilty. I am going to say nothing."

Finally, at the trial, being represented by counsel and having the advantage of his advice, he did not go into the witness-box.

Those were the matters to which the Judge referred in calling the attention of the jury to the appellant's conduct. Each stage mentioned above was referred to, and in particular the Judge referred to the appellant's failure to make any further statement before the justices and his failure to go into the witness-box at the trial.

Counsel cited four cases. In the first, FEIGENBAUM (14 Cr. App. R. 1; [1919] 1 K. B. 431) Avory, J., referred to CHRISTIE (10 Cr. App. R. 141; [1914] A. C. 545), in the House of Lords, where observations of great authority were made as to the circumstances in which the conduct of an accused person in the face of an accusation may become admissible as evidence against him. In FEIGENBAUM (*supra*), where a police constable had described to the appellant in some detail allegations which were being made, and the latter had made no reply, it was held that the evidence of the constable, if accepted, might be regarded as affording some corroboration of the evidence given against the appellant by the actual thieves, who were his accomplices.

In WHITEHEAD (21 Cr. App. R. 23; [1929] 1 K. B. 99) it was held not to be corroboration that the accused person

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made no denial when cautioned and charged. It is necessary in the present case to consider whether an insufficiently strenuous denial can afford more corroboration against the prisoner than the absence of any denial at all.

WHITEHEAD (*supra*) has been followed in two other cases—namely, CHARAVANMUTTU [1930] (22 Cr. App. R. 1) and NAYLOR [1932] (23 Cr. App. R. 177). In the latter case the Lord Chief Justice (Lord Hewart), delivering the judgment of the Court, said (at p. 180): "When one looks at the words of the formula"—the formula which was adopted also by the committing justices in this case—"which must be deliberately framed, it is quite obvious that they were intended to convey and do convey to the prisoner the belief that he is not obliged to say anything unless he desires to do so. Now if those words are really to be construed in this sense, that, having heard them, an accused person remains silent at his peril, and may find it a strong point against him at his trial that he did not say anything after being told he was not obliged to say anything, one can only think that this form of words is most unfortunate and misleading."

It may be that on some future occasion this Court will think it necessary or desirable to consider the question whether and, if so, on what grounds FEIGENBAUM (*supra*) can be reconciled with the three later cases referred to, or, on the other hand, whether, having regard to the later cases, FEIGENBAUM (*supra*) must now be considered as overruled. It is sufficient for present purposes to say that this Court appears to have followed WHITEHEAD (*supra*) from the time when it was decided, PARKER [1932] (24 Cr. App. R. 2) being clearly distinguishable.

In the clear opinion of this Court, some at least of the appellant's conduct to which the Judge referred in directing the jury, and most obviously his conduct, when addressed by the committing justices, in not making any denial of the charge beyond saying that he was not guilty, cannot in point of law be regarded as affording corroborative material

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for the jury. It is impossible to say whether that part, if any, of the material which was admissible would have been sufficient to satisfy the jury. The Judge told the jury that they could consider as affording the necessary corroboration the appellant's conduct from first to last in failing adequately to deny the charge. In our opinion that conduct did not in point of law afford such material, and accordingly the conviction cannot stand and must be quashed, and this appeal is allowed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, Mr. JUSTICE HUMPHREYS AND Mr. JUSTICE SINGLETON.

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23 *March.*

CHARLES ELTON.

Sexual Offences—Desirability of Prisoner Being Represented by Counsel.

Observations on the desirability of a prisoner charged with a sexual offence being represented by counsel.

Application for leave to appeal against conviction and sentence.

The appellant, who was fifty-eight years of age, was convicted at Derbyshire Assizes on February 13, 1942, of carnal knowledge of a girl aged fifteen and was sentenced by Macnaghten, J., to eighteen months' imprisonment.

No counsel appeared on either side.

HUMPHREYS, J.: The conviction was a most proper one, and indeed the evidence was overwhelming. With regard to sentence, it is quite impossible to say that a sentence of eighteen months' imprisonment is too heavy in the case of

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CHARLES ELTON.

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a man fifty-eight years of age who has been convicted of this offence in regard to a child who might be his granddaughter; it is a disgusting offence, and one for which a heavy sentence is most appropriate.

There is one observation which the Court thinks right to make in addition. The only real objection that the applicant can put forward to his trial is that he was refused legal aid. He applied to the magistrates for legal aid and they refused it. He applied again to the learned Judge at the trial, but not, so far as the documents show, before the commencement of the trial. When he was called on to cross-examine the first witness, his answer was: "I require legal aid". Later on, after the witnesses for the prosecution had been called, he was asked whether he wished to give evidence, or to make a statement from the dock, and his answer was: "Could I have legal aid? I have no one to speak for me". The learned Judge then said it was too late for him to apply for legal aid, and on consideration came to the conclusion that it would be wrong to assign to him, particularly at that stage of the case, counsel to defend him. But, in spite of that, the applicant said on two more occasions later on: "I am unable to plead for myself. I require legal aid" and "You should give me legal aid". The result was that he put up no defence at all.

This Court has often said that in cases of a sexual nature it is desirable that legal aid should be given to a prisoner without means who asks for it, if only because it prevents him from having a feeling of grievance, as this applicant has. This Court does not differ at all from those statements. In this particular case there can be no question as to the result of this application, because the conviction was obviously a right one, and the same result must have followed even if the applicant had been given legal aid. The application is refused.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, Mr JUSTICE HUMPHREYS AND Mr. JUSTICE CASSELS.

1942.
20 *April.*

DANIEL DUERDEN.

Sentence—Penal Servitude—Term Exceeding Five Years.

Observations on sentences of penal servitude for terms exceeding five years.

Appeal against sentence.

The appellant pleaded guilty at Manchester Assizes on February 25, 1942, to carnal knowledge of a girl aged twelve and was sentenced by Stable, J., to ten years' penal servitude.

No counsel appeared on either side.

THE LORD CHIEF JUSTICE: The case was one of undeniable gravity. Some of the circumstances were such as to lead anyone to the conclusion that upon conviction the prisoner should be sentenced to a severe term of imprisonment or penal servitude, but we have formed the opinion that the sentence of ten years' penal servitude is once which should be reduced. There must sometimes be cases of such gravity and of such a character as to require a sentence of ten years' penal servitude to be passed, but undoubtedly, within the memory of the members of the Court, the habits of the age have led to a reconsideration of sentences of this severity. Although a generation ago sentences of ten years' penal servitude were common, to-day they are rarely passed, and, in the opinion of the Court, should be very rarely passed.

In this particular case, the appellant is sixty years of age, and a sentence of ten years' penal servitude is

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DANIEL DUERDEN.

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equivalent to a life sentence; but, quite apart from that circumstance, even if the appellant were younger than he is, in our opinion a sentence of five years' penal servitude would have been a proper one in the circumstances of the case.

We think it right to make these observations with regard to sentences of more than five years' penal servitude. In this case, horrible though it is in some of its features, we think that a sentence of five years' penal servitude is both severe and adequate. We therefore reduce the sentence to one of five years' penal servitude.

Sentence reduced.

BEFORE

THE LORD CHIEF JUSTICE, Mr. JUSTICE HUMPHREYS AND Mr. JUSTICE CASSELS.

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21 *April.*

ARTHUR WILLIAM KIRK.

Sentence — Unnatural Offence — Maximum Term of Penal Servitude.

Observations on maximum term of penal servitude for indecent assault on a male person.

Appeal against conviction and sentence.

The appellant, who was thirty-one years of age, was convicted at Manchester Assizes on March 2, 1942, of indecent assault on a boy of seven and of committing an act of gross indecency with the same person, and was sentenced by Stable, J., to concurrent terms of ten years' penal servitude and two years' imprisonment with hard labour.

No counsel appeared on either side.

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ARTHUR WILLIAM KIRK.

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CASSELS, J. [after stating that, in the opinion of the Court, there was no ground for interfering with the conviction:] There still remains the question of sentence. In each case the maximum sentence was passed. The law provides a maximum sentence of two years' imprisonment for the offence of gross indecency with a male person, or for an indecent assault on a female person. The maximum sentence for the offence of an indecent assault on a male person is that which was passed in this case, namely, ten years' penal servitude. It is quite clear, therefore, that the law takes a serious view of this offence, associating it with the offence of attempted buggery and assault with intent to commit buggery, but this Court feels that a sentence of ten years' penal servitude on the appellant, horrible as the offence was, is too long. As this Court said yesterday in DUERDEN (1942), 28 Cr. App. R. 128, sentences of the length of ten years are not usually passed in this age of moderation and leniency, unless the circumstances show an offence or offences of the utmost gravity. It is perfectly true that in June, 1941, the appellant was released from a sentence of eighteen months' imprisonment for an indecent assault on his stepson aged twelve. It is clear, therefore, that he should be detained, and small boys protected from his attentions, for a long period, but this Court has come to the conclusion that this is not a case for the passing of the maximum sentence, and therefore reduces the sentence for indecent assault to one of six years' penal servitude, the sentence for the act of gross indecency to remain at two years' imprisonment with hard labour, both sentences to run concurrently.

Sentence reduced.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE CASSELS.

ALEXANDER GORDON BONNYMAN.

1942.
27 & 28 *April.*

Manslaughter—Neglect of Helpless Person—Summing-up.

Observations on the proper direction to the jury as to the degree of negligence necessary to support a charge of the manslaughter of a helpless person and on the effect of the jury not being specifically asked to find whether the deceased person was utterly helpless where the evidence on this issue is clear and overwhelming.

CHATTAWAY (1922), 17 Cr. App. R. 7, and CHARLOTTE SMITH (1865), 10 Cox C. C. 82, considered and approved.

BATEMAN (1925), 19 Cr. App. R. 8, and ANDREWS, 26 Cr. App. R. 34; [1937] A. C. 576, applied.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on March 2, 1942, of the manslaughter by negligence of his wife and was sentenced by Humphreys, J., to twelve months' imprisonment.

The appellant was a medical man. He married in 1930. Soon after his marriage he discovered that his wife was a drug addict, and he himself subsequently (according to his own evidence, in 1940) became a drug addict. According to his evidence, his wife obtained her own morphia by writing what were called prescriptions, and having obtained the morphia dilute, concentrated it for the purpose of injection by a syringe. In February, 1940, the appellant's wife was persuaded by another doctor named Prasad to go into hospital, and her health improved. In April, 1941, an air-raid resulted in the destruction of the house in which the appellant and his wife were then living. Evidence was given by a Mrs. Putnam that she climbed into the house and found the appellant's wife in a very dirty and neglected

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condition, and that she proposed to take her home, but that the appellant said she was too ill to be moved. Mrs. Putnam further stated that she gave the appellant a warning that his wife was his responsibility and that he would run the risk of a charge of manslaughter if anything happened to her. Three days later she was taken round to Mrs. Putnam's house in an ambulance. Mrs. Putnam gave evidence that the appellant's wife was unable to get up alone, but that her state improved, and that the appellant neither treated her nor watched her injections, though asked to do so, but gave her, on the other hand, injections which he said were injections for anæmia. In August, 1941, the appellant's wife was moved to another house. Before she was removed, the appellant would not let the doctor who had seen her in hospital (Dr. Prasad) go upstairs to see her in bed, but brought her down in his arms. She was then dirty, her hair was matted, and she had open ulcers. The next day Dr. Prasad wished to see her, and was told by the appellant that if his services were required he would be summoned. The condition of the appellant's wife then became steadily worse. She was unable to do anything except sit on a chair, with her head resting on a cushion placed on a box beside her. Women who attended her from day to day stated in emphatic terms that she was physically helpless. Eventually she was taken upstairs, and then to hospital, and died on the day of her admission to hospital. Her weight was at that time just over three stone, she was unable to flex her knees in the ordinary way and was suffering from gangrenous abscesses which had affected even her eyes.

The appellant's case was that his wife was stubborn and would not let him do anything for her.

Linton Thorp, K.C., and *C. Warren*, for the appellant:

The appellant's defence was not adequately put to the jury. Moreover, the Judge assumed that the appellant's

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wife was completely helpless, instead of leaving this issue to the jury. [He referred to CHATTAWAY (1922), 17 Cr. App. R. 7.] Further, the jury were not properly directed on the degree of negligence necessary to constitute manslaughter. [He referred to BATEMAN (1925), 19 Cr. App. R. 8; ANDREWS, 26 Cr. App. R. 34; [1937] A. C. 576, and CHARLOTTE SMITH (1865), 10 Cox C. C. 94.]

M. Bull, for the Crown.

THE LORD CHIEF JUSTICE [after reviewing the evidence and the summing-up]: The next point that is taken is that the jury were not asked to consider whether the appellant's wife was as helpless as the prosecution represented, and, instead of the jury being asked to consider whether she was helpless or not, the learned Judge assumed throughout that she was helpless. The case which has been relied upon for the proposition put forward by Mr. Thorp that this is a question for the jury is CHATTAWAY (1922), 17 Cr. App. R. 7. That is a case in which the question of helplessness was not left to the jury. The Lord Chief Justice (Lord Hewart) said that it was a question for the jury, but added (p. 8): "In the present case there can be no doubt what the answer of the jury would have been if they had been expressly asked the question whether at the material times the deceased was as helpless as an infant under the appellants' control." That case makes it impossible for the contention to succeed that the conviction should be quashed because the jury were not asked to decide that question. In face of the evidence given by the doctors, which I have recited, and by the women who were called by the defence that she was helpless, nobody, in our judgment, could come to any conclusion other than that she was as helpless as a person could be to deliver herself from this pit into which she had fallen.

Next, it is said that the jury were given the wrong direction on what they must find. I must observe that sometimes in this Court, which is a Court of appeal on

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questions of law, there is a temptation, as learned counsel himself has realised, and as we all realise, to look at a summing-up as though it were to be treated as a legal disquisition. What juries require is a straightforward direction on the law and not an argument, a straightforward direction which will aid their common sense in arriving at a verdict upon a particular charge. Judge and counsel may understand the turns and twists of a legal argument, but juries are less likely to appreciate its advantages. In this particular case, it would have been quite idle for the learned Judge to go through the cases which have been cited to us, or perhaps have gone back, as indeed Lord Hewart did in one of the cases, to the observations to be found in *Hale's Pleas of the Crown*, 250 or more years ago. It seems to us that the learned Judge gave the jury just those directions which would help them in addressing their minds to the right question. Negligence, everybody agrees, in the sense of a mere want of ordinary care, is not enough to justify conviction by a jury on a charge of manslaughter. It is not suggested that it is enough. That was made plain in BATEMAN (1925), 19 Cr. App. R. 8, with which the Courts and counsel are now so thoroughly familiar, where the Lord Chief Justice (Lord Hewart) said at p. 11: "But, whatever epithet be used, and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

Therefore, the only question that arises is: What qualification or what addition to the mere word "negligence" is required in order to indicate to a jury the degree of negligence which they must find to justify a verdict of manslaughter? Mr. Thorp's argument has fastened on the

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epithet "wicked" negligence. He criticises an observation of the learned Judge, who said that to his mind the use of the word "wicked" suggested something like a wicked intention, and he thought that it was an undesirable word to use for that reason. The learned Judge preferred the word "reckless". We have been taken once more round the familiar ground which is strewn with the familiar epithets, and it is not for me to attempt to do what was done in BATEMAN (*supra*) and later on in the House of Lords in ANDREWS, 26 Cr. App. R. 34; [1937] A. C. 576. Lord Atkin in his speech said plainly that in his view—and his speech was approved by the other noble Lords—the word "reckless" most nearly covered the case. He said (26 Cr. App. R., at p. 4; [1937] A. C., at p. 583): "For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied 'reckless' most nearly covers the case. It is difficult to visualise a case of death caused by 'reckless' driving in the connotation of that term in ordinary speech which would not justify a conviction of manslaughter." So that, so far as the House of Lords is concerned in the most recent consideration which has been given to this question of epithets, if an epithet is to be given to help the jury, "reckless" is the one which is to be preferred. The word "wicked" was the word which was used in the case of NICHOLLS (1874), 10 Cox C. C. 75, but even there, be it said, it was not used in its bare, unexplained sense, for Brett, J. (at p. 76), said: "Mere negligence will not do"—that, of course, stands to-day—"there must be wicked negligence, that is, negligence so great, that you must be of opinion that the prisoner had a wicked mind, in the sense that she was reckless and careless whether the creature died or not." There one finds the word "reckless" which has been now approved by the House of Lords as probably in all the circumstances

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the best epithet to use to help a jury to understand that a special or a high degree of negligence must be found by them before they can return a verdict of manslaughter.

The learned Judge gave to the jury two simple and helpful illustrations of the difference between the two degrees of negligence. The first was the case of a motor driver going round a corner too fast and driving too wide and getting on the wrong side of a country road, and finding what he did not expect to meet, another vehicle coming in the opposite direction. That, he said, might found an action for damages, but would not justify a verdict of manslaughter. On the other hand, if a motorist, being warned, or being aware of the presence of children, drove at forty miles an hour because he was in a hurry, and killed one of them, that might be evidence of a degree of negligence which would justify a verdict of manslaughter.

We have read the summing-up; we have had it re-read to us yesterday and to-day. We think that the learned Judge gave not only accurate and careful directions to the jury, but such directions as would most certainly and most surely lead them to appreciate the questions which they had to consider. We can find nothing in the nature of misdirection in the summing-up of the learned Judge, and in this case we think there was the most ample justification for the decision of the jury that the higher degree of negligence which was necessary was proved.

I want only to say one other word, and that is about a case which has been referred to this morning, CHARLOTTE SMITH (1865), 10 Cox C. C. 82, where Erle, C.J., was dealing with the case of a servant whom the defendant there was charged with having killed. He said (at p. 94): "The law is undisputed that, if a person having the care and custody of another who is helpless, neglects to supply him with the necessaries of life and thereby causes or accelerates his death, that is a criminal offence. But the law is also clear, that if a person having the exercise of free will, chooses

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to stay in a service where bad food and lodging are provided, and death is thereby caused, the master is not criminally liable. The question therefore is, whether the deceased Martha Turner was so helpless in mind and body as to be unable to take care of herself and to withdraw herself from the prisoner's dominion." Can anybody, I ask, who has read the evidence or heard the evidence in this case, have any doubt that this unhappy woman was unable to withdraw herself from the care of the appellant, or was not in a position to give herself any help to deliver herself from her mental and physical ailments? CHARLOTTE SMITH (*supra*) seems to us to tell against the propositions which have been advanced by learned counsel upon the facts of this case, and for the reasons I have mentioned we come clearly to the conclusion that she was as helpless as a human being could be, and that the plain duty of the appellant was to have given her aid and treatment, which he withheld.

Upon those grounds we think that the jury, properly directed, came to a verdict which cannot be assailed, and for these reasons we dismiss this appeal.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE CASSELS.

1942.
5 & 6 *May.*

ARTHUR SHAW.
JAMES BOWHILL AGARD.

Long and Complicated Case—Duty of Prosecution to Divide.

Observations on the duty of those responsible for the prosecution in a long and complicated case to consider the possibility of dividing it into parts.

Appeals against conviction and sentence.

The appellants were convicted at Middlesex Sessions on January 23, 1942, of receiving stolen motor cars and were sentenced by the Deputy Chairman, in the case of Shaw to three years' penal servitude, and in the case of Agard to eighteen months' imprisonment, and were each ordered to pay £50 towards the costs of the prosecution.

It is unnecessary to set out the facts of the case, beyond stating that it arose out of alleged felonious transactions with regard to motor cars, concerned four persons in addition to the appellants, related to sixteen motor cars and other property owned by seventeen different owners, and covered a period of nine months. In the first count of the indictment, which contained twenty-two counts, all the prisoners were charged with conspiracy to receive stolen property. Of the remaining twenty-one counts, ten concerned single prisoners only, four charged two prisoners (but not the same two), five charged three prisoners (but not the same three), and two charged four prisoners (but not the same four). On the first day one prisoner, Edward John Smith, pleaded guilty to eight counts, and another prisoner, Donald Percival Terry, pleaded guilty to twelve counts. The prosecution accepted these pleas. These two prisoners were sentenced, and the trial of the other four

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(including the two appellants) then commenced. On the third day of the trial one of these four, Leslie Hemmings, withdrew his plea and pleaded guilty to three of the six counts in which he was charged, and was so found by the jury. The prosecution did not proceed on the remaining counts. More than thirty witnesses, including Smith, who had pleaded guilty and been sentenced, were called for the prosecution. In the result the three remaining prisoners (including the two appellants) were found not guilty on the count for conspiracy, but guilty on the rest of the counts in which they were charged.

The grounds of appeal in the case of Shaw were confusion and misdirection in the summing-up, and insufficiency of the evidence; in the case of Agard that the verdict was unreasonable, that there was misdirection and non-direction; and that there was no corroboration of the evidence of the accomplice Smith.

M. Maxwell, for the appellant Shaw.
Serjeant A. M. Sullivan, K.C., and *W. G. Fordham,* for the appellant Agard.
Laurence Vine, for the Crown.

CASSELS, J. [after stating that in the opinion of the Court the conviction of Agard must be quashed, and the conviction of Shaw on certain counts quashed owing to confusion of the evidence in the summing-up and the absence of a direction upon possession:] The Court desires to make some observations upon the way in which this case was presented for trial. The indictment contained twenty-two counts and concerned six prisoners. The trial itself concerned three prisoners all the time, and a fourth prisoner for part of the time, and the prisoners were separately represented. No fewer than fifteen counts were under consideration concerning twelve different cars and other property, and the evidence of thirty-eight witnesses was

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before the Court. The trial lasted six days, and the transcript of the shorthand note runs into 329 pages.

In a case so full of detail concerning at first four, and then three, different prisoners, it was unreasonable to expect that a jury could grasp and retain the evidence in its entirety, and as it concerned the separate counts and the individual prisoners. Such an involved case throws an unmerited strain upon a jury and even upon the Court. It is not surprising that the learned Deputy Chairman confessed on the fourth day of the trial: "Quite frankly when I begin to get into all these letters and numbers, I am completely befogged." It would not have unduly taxed the ingenuity of those responsible for the prosecution to have divided the trial into at least three parts. Such a course would have reduced the issues for the jury, and rendered easier the duties of the Court. We recommend for the future guidance of those who have the charge of prosecutions that they should seriously consider the possibility of dividing these long and complicated cases. We think that such a course will make for the efficiency of the administration of criminal justice and be in the interests both of defendants and juries.

The sentence in the case of Shaw is reduced to one of eighteen months' imprisonment.

One conviction quashed.
One conviction quashed in part and sentence reduced.

Solicitors: N. A. Woodiwiss, for appellant Agard; Solicitor of Metropolitan Police, for the Crown.

NOTE TO PRINCE (*ante*, p. 41).

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8 *June.*

During the hearing of an appeal by Douglas Edmondson on June 8, 1942, when the topic of provocation by words was

under discussion and reference was made to PRINCE (*supra*), it was pointed out by Tucker, J., that in that case the indecent suggestion in words was alleged to have been followed by an actual indecent assault on the appellant Prince by Bown (the person killed). This fact was confirmed by a reference to the shorthand note of the trial of Prince.

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FREDERICK BARNES.

1942.
10 *June.*

Unreasonable Verdict—Receiving Stolen Goods—Unsatisfactory Evidence of Larceny—Chief Witness for Prosecution Unsatisfactory.

Conviction of receiving stolen goods quashed in a case where the summing-up was not open to any criticism, but the evidence of larceny of the goods and the evidence of the principal witness for the prosecution were both unsatisfactory.

HART (1914), 10 Cr. App. R. 176, and WALLACE (1931), 23 Cr. App. R. 32, referred to.

Appeal against conviction.

The appellant was convicted at Middlesex Sessions on April 13, 1942, of receiving stolen property and was sentenced by the Deputy Chairman to six months' imprisonment.

The appellant was charged with receiving an electric drill knowing it to have been stolen. The evidence was that the drill had disappeared from the premises of the person to whom it belonged in a manner which was not clearly proved,

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10 *June.*

FREDERICK BARNES.

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and that three months later it found its way into the possession of the appellant. The principal evidence inculpating the appellant was that of a man named Clifford, who was an unsatisfactory witness. The facts are set out fully in the judgment.

J. P. Valetta, for the appellant.
Alban Gordon, for the Crown.

HUMPHREYS, J.—The appellant was convicted at Middlesex Sessions after a trial which took place before the learned Deputy Chairman, who is a lawyer of considerable experience, of the offence of receiving property knowing it to have been stolen. He was granted leave to appeal in order that this Court might consider a single point which has been put by Mr. Valetta on his behalf to-day, namely, whether the trial was satisfactory. Those are not quite the words of the Criminal Appeal Act, 1907, but they represent perhaps sufficiently closely the grounds mentioned in section 4 (1) upon which an appeal shall be allowed: "The Court, upon any such appeal against conviction, shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence." Those last words have been interpreted in more than one case in this Court as amounting to this: if the Court thinks that the verdict is, on the whole, having regard to everything that took place in the Court of trial, unsatisfactory.

It may be desirable to state at once the view which the Court has taken, as shown by authorities, upon that question. There are two authorities to which it seems useful to refer. The first is WALLACE (1931), 23 Cr. App. R. 32. That was an appeal against a conviction of murder. It was a case in which it was common ground that nothing could be said by way of criticism of the conduct of the trial, or the summing up of the learned Judge. The contention was that the

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evidence, when it came to be looked at closely—and the Court of Criminal Appeal spent two days hearing the appeal—was, as to certainly almost all of it, consistent with guilt, but, also, perhaps, consistent with innocence. The facts were, naturally, totally different from the facts of this case, and it would not be useful even to refer to them, but, in giving the decision of the Court, the Lord Chief Justice (Lord Hewart) used this expression (at p. 35): "I should like to add that there is not, so far as we can see, any ground for any imputation upon the fairness of the police, but the conclusion at which we have arrived is that the case against the appellant, which we have carefully and anxiously considered and discussed, was not proved with that certainty which is necessary in order to justify a verdict of guilty, and therefore that it is our duty to take the course indicated by the section of the statute to which I have referred"—that is the section which I have just read. "The result is that the appeal will be allowed and the conviction quashed."

In that case reference was made to HART (1914), 10 Cr. App. R. 176. That there was a charge of a sexual character, an indecent assault, in which the learned Judge had advised the jury to acquit, but the jury had convicted. This Court said, and we repeat the observation here, that the mere fact that the trial Judge is not satisfied with the verdict of guilty of a jury is of itself no ground for saying that that verdict should be set aside, but it is an element to be taken into consideration by the Court of Criminal Appeal in any case where it is proved to be a fact, as the headnote of that case correctly states. In giving the judgment of the Court, the Lord Chief Justice (Lord Reading) made these observations (at p. 178): "The case deals with an assault on a girl who was just fourteen years of age. . . . No complaint can be made of the direction of the Deputy Chairman, who clearly indicated to the jury that his own view was one favourable to the appellant. It

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is just one of those cases where it is difficult to say what is the exact piece of evidence that leaves an unsatisfactory impression on the mind. This Court has power to allow an appeal if it cannot be supported, having regard to the evidence; and looking at the whole of the evidence, and bearing in mind the observations of the Deputy Chairman, who heard the witnesses and observed their demeanour, we have come to the conclusion that this was not a satisfactory verdict, and that, therefore, the conviction must be quashed."

Those cases tend to show that it is often, as we think it is in this case, difficult to place upon a single legal ground the reason why we have come to the conclusion at which we have in fact arrived, that the verdict of the jury in this case was not satisfactory.

The case was of this nature: the appellant was charged in two counts of the indictment, first of all with receiving a quantity of stolen rhubarb in ninety-one tins, and secondly with receiving, knowing it to be stolen, an electric drill. The two matters were completely separate; there was no fact common to both of them. In regard to the tins of rhubarb, evidence was given for the purpose of showing that they were stolen. They were undeniably found upon certain premises of the appellant, in a garage which he rented, and he made a statement with regard to those tins which might be described as not very satisfactory, but at the close of the case for the prosecution, and after all the evidence had been given, the learned Deputy Chairman ruled that there was no sufficient identification of those tins to justify the case proceeding any further. Therefore he directed the jury, as a matter of law, to acquit, which the jury did. It was an unfortunate fact—though we are not suggesting that the smallest blame attaches to anybody with regard to it—that the jury who then had to try the case of the electric

drill had in their minds all this other story with regard to the tins.

The electric drill was the property of a company who were represented by a gentleman named Humphrey, and was used in the works of that company. On a Saturday it had been handed to an employee of the company named Clifford, in order that he might use it in the course of his work. He had apparently on the following Monday gone to a director and said: "I used that drill on Saturday. I did not put it back in your office, but what I did was I locked it up in my own drawer"—he had access to a drawer on the premises of which he had the key—"and that is where I left it. I have now found out that what happened to it was that either on that Saturday night, or early Sunday morning, a fellow-workman of mine, one of your employees, wanted to use it on some work he wanted to do on the Sunday, and accordingly he broke open my drawer, he used the drill, and when he had finished with it he did not put it in any safe place, but left it about somewhere, either attached to the machine which supplied the power, or in some other place, and it got stolen." We do not know, and the jury did not know, and nobody suggested, what the truth was, whether some person from outside broke into the premises and stole it, or whether it was yet another fellow-employee who had stolen it. Clifford's story was: "It has gone", and we must assume, although this case was proved by an absence of evidence far more than it was by the calling of evidence, that it was a fact, and accepted as a fact, that some other workman had admitted that he had broken open that drawer, and had left this electric drill lying about somewhere, and that is how it disappeared. All that happened some time in the month of October, 1941.

The next thing that was heard about the electric drill was on January 30, 1942, about three months afterwards, when the police, having found the ninety-one tins of

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rhubarb on the premises of the appellant, went to other premises owned by the appellant, a small boot-repairing shop at Neasden. There, apparently attached to an electric machine, and actually in use at the time, or in a position to be used, was this electric drill. The appellant, being asked by the police officer what was his explanation with regard to that, gave an answer, and the answer, according to the police officer first of all, was this: The appellant said that the drill had been lent or given to him by a mate of his. Then the police officer was asked to be a little more accurate and definite about it, and, looking at his note-book, said: "What exactly [the appellant] said was 'The drill a mate of mine asked me to look after for him'." Much later in the case it appeared that the appellant had made another statement after he had been taken to the police station and charged, and said: "I will tell you the name of the mate; it is a man named Clifford. That is the man I got it from." That was the story of the police officer, not very satisfactorily told because of the omission to which I have referred. Why that police officer could not have told the whole story accurately in the first instance nobody knows. I do not think anyone suggested that he was intentionally keeping anything back, but it was certainly an unsatisfactory feature in the case that it was only at the very end of all the evidence, when the Deputy Chairman seems to have noticed from his copy of the depositions that it had come out at the police court that the appellant had at once said: "The mate's name is Clifford", that the policeman was recalled and told the whole story.

The evidence, then, was that this drill had disappeared in some very odd sort of way, which was not very clearly proved, from the premises of the person to whom it belonged, and three months afterwards had come into the possession of a man who carried on a boot-repairing shop, and, oddly enough, said that he got it from the very man

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who had it in his possession at the time when it disappeared, and that was a man named Clifford. There was only one Clifford. Unless Clifford could satisfactorily dispose of that story told by the appellant, no jury could, or would have been allowed to consider, the question of convicting him. All that any man can do if, unfortunately for himself, he is found, three months after it has been stolen, in possession of some article, is to say where he got it, and if his story is consistent with innocence, and is not proved to be untrue, he is entitled to be acquitted. If, therefore, Clifford had not been called as a witness, it is quite plain that the jury would have had to be told: "You cannot convict the prisoner; he says he got it from a man named Clifford, and there is not a shred of evidence to show that that is not true, and if he got it from Clifford, why should not he think he got it honestly?" But Clifford was called. We have had a very frank statement in this Court from the learned counsel for the prosecution, which has been of great assistance to us. Mr. Gordon, who prosecuted then, and has appeared for the Crown to-day, has said that, although Clifford was called, and completely denied the statement of the appellant that the appellant ever got the drill from him at all, and said that his only knowledge of the appellant was that they happened to sit next to one another at a quick-lunch counter, or something of that sort, most people in Court formed the impression that Clifford had not told all he knew about the matter.

Our attention has been drawn to the fact that the learned Deputy Chairman himself in the course of the case put some questions to Clifford which at least seem to indicate that there was a lingering suspicion in his mind that Clifford might be something other than an extremely honest workman, who, having unfortunately lost something belonging to his employer, went and told him quite frankly about the loss the next morning. Mr. Gordon also added that, in

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his view, Clifford was a most unsatisfactory witness and, indeed, it appears from the depositions that everybody had great difficulty in getting answers out of him.

That being so, it is really not necessary to go further in this case than to say that it appears to us, with the additional knowledge which perhaps we have of the matter, that the jury may have assumed that all that they had to do was to say whether Clifford or the appellant was telling the truth because, Clifford being a completely honest and reliable person, if his evidence was true, then it followed that the evidence of the appellant must be untrue. We think it is very difficult to say that of the evidence in this case, knowing what we now know with regard to Clifford.

There remains the fact, although this Court could not accept Mr. Valetta's argument that there was no evidence that this drill was stolen, that the prosecution could, if they had chosen, have called every witness who had anything to do with that article, and shown exactly how it came to be stolen and when it was stolen, whereas in fact the matter was left in that most unsatisfactory manner. The article was handed to Clifford; Clifford reported it as gone, and the jury were asked to accept that the way in which it went was that some fellow-workman did something or other with it, as the result of which some other unknown fellow-workman probably stole it. That is not a very satisfactory way to prove one of the essential elements of the charge of receiving, that the goods were in fact stolen.

The case was one in which the learned Deputy Chairman undeniably formed a very strong view, and his summing up was one of which it may be said that, short of withdrawing the case from the jury, it could not have been put more strongly. He did all he could to point out to the jury the extremely unsatisfactory nature of the evidence, and warned them in the clearest terms as to the danger of accepting such a case for the prosecution. In the last words of his

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summing up he used such expressions as these: "I wonder who stole this drill; I wonder if the person who stole it gave it to the prisoner; I wonder if the person who stole it and gave it to the prisoner gave the prisoner to believe, or the prisoner knew, it was stolen. I can go on wondering, but there is no evidence of who stole it, and you may think there is no evidence that this man knew when he received it that it had been stolen"; and it was upon those lines that he asked them to consider their verdict.

This Court has come to the conclusion, without in the least blaming anybody in this case, and certainly not suggesting for a moment that the learned Deputy Chairman could have done anything more than he did in the matter, that this was not a satisfactory verdict and, to repeat the expression used by the Lord Chief Justice (Lord Hewart) in WALLACE (*supra*), we say: We have come to the conclusion that the case against the appellant was not proved with that certainty which is necessary in order to justify a verdict of guilty; therefore, upon that ground we allow this appeal, and direct that this conviction should be quashed.

Conviction quashed.

Solicitor: Solicitor of Metropolitan Police, for the Crown.

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THE LORD CHIEF JUSTICE, MR. JUSTICE TUCKER AND MR. JUSTICE HALLETT.

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CHARLES CULLUM.

Extension of Time for Leave to Appeal—Necessity of Showing Special Reason for Relaxation of Rules.

An extension of time within which to ask for leave to appeal will not be granted unless some special reason is shown why the rules governing the procedure of the Court should be relaxed.

LESSER (1939), 27 Cr. App. R. 69, followed.

The applicant was convicted at the Central Criminal Court on January 29, 1942, of receiving stolen property and was sentenced by the Commissioner to three years' penal servitude.

Vernon Gattie, for the applicant.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The applicant asks for an extension of time within which to ask for leave to appeal, being now more than three months out of time. Mr. Gattie has stated as the applicant's explanation of the delay that his financial affairs were in such disorder that he was of opinion that it was not possible for him to proceed with his appeal, but the Court has not been furnished with any particulars as to any special reason why the rules should be relaxed in this case.

As Humphreys, J., said in LESSER (1939), 27 Cr. App. R. 69, the rules are of importance. We have constantly refused applications for an extension of time within which

to make an appeal when there have been no substantial merits brought to our notice which seem to justify the Court in extending the time, and in this case we think we must pursue the same course and refuse to exercise our powers to extend the time for appeal.

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Application refused.

Solicitor: J. H. Fellows, for applicant.

BEFORE

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Summing-up—Alibi—Misstatement as to Time of Disclosure—Conviction Quashed.

On the trial of two prisoners for housebreaking and larceny the case for the prosecution rested mainly on the evidence of a young woman who said that she had been in the company of the prisoners immediately before and immediately after the crime was committed and deposed to conversations between them referring to the crime. At the trial one prisoner went into the witness-box and also called witnesses to prove an *alibi*. The other prisoner did not give evidence, but counsel who defended him relied on the *alibi* set up by his co-prisoner. When before the magistrates the prisoner who gave evidence at the trial stated that his defence would be that of *alibi*, but gave no particulars. Five days later, however, his solicitors wrote to the solicitors acting for the police giving particulars of the *alibi* and naming the witnesses who would be called

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in support of it. The Judge, not having been informed of this fact, referred in his summing-up to the *alibi* as having been disclosed for the first time at the trial.

Held, that the defect in the summing-up was a fatal one and that the convictions of both prisoners must be quashed.

NAYLOR, 23 Cr. App. R. 177; [1933] 1 K. B. 687; PARKER, 24 Cr. App. R. 4; [1933] 1 K. B. 850, and LITTLEBOY, 24 Cr. App. R. 192; [1934] 2 K. B. 408, referred to.

Appeals, in the case of the first appellant, against conviction only, and, in the case of the second appellant, against conviction and sentence.

The appellants were convicted at Leicester City Quarter Sessions on April 8, 1942, of housebreaking and larceny, and were sentenced by the Recorder, in the case of Dawkins, to twenty-one months' imprisonment with hard labour, and in the case of Toone, to five years' penal servitude.

The case for the prosecution rested mainly on the evidence of a woman named Barbara Williams, who had formerly been a mistress of Toone, but had been discarded by him before the date of the trial. She gave evidence that she had been in the company of the two appellants in a public house at 7.30 p.m. on the night of the crime; that she had then heard references to the proposed crime by them; that they had left her for about an hour, and then returned to the public house; that she had then driven with them in a motor car and had seen a number of pound notes in Toone's possession and heard statements by him to Dawkins as to the manner in which the notes had been obtained. She also gave evidence of various purchases, etc., by Toone on subsequent days involving the passing by him of a considerable number of pound notes.

When before the magistrates, both appellants reserved their defences, Toone stating that he had a defence of *alibi*. Five days later, Toone's solicitors wrote a letter to the solicitors acting for the police, giving particulars of the

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alibi and naming the witnesses who would be called in support of it. At the trial Toone gave evidence that he was in the house of one Maurice during the whole of the material time, and called a number of witnesses in support of that *alibi*. Dawkins did not give evidence, but his counsel relied on Toone's *alibi* as discrediting the evidence of Barbara Williams. In his summing-up the Recorder, not having been informed of the letter aforementioned, stressed the fact that (as he believed) Toone's *alibi* had been disclosed for the first time at the trial.

Richard O'Sullivan, K.C., and *C. E. Loseby*, for the appellant Dawkins:

The mistake of the Recorder as to the time when the *alibi* was disclosed was fatal, because it went to the very root of the defence of both appellants. In LITTLEBOY, 24 Cr. App. R., at p. 198; [1934] 2 K. B., at p. 414, the Lord Chief Justice (Lord Hewart) said: "Observations upon the failure to disclose a defence at some date earlier than the trial have to be made with care and with fairness to the accused person in all the circumstances of the case." Here the mistake which the Recorder unwittingly made must necessarily have caused grave prejudice to the appellant. [He referred also to NAYLOR (*supra*) and PARKER (*supra*).]

Hector Hughes, K.C., and *S. L. Elborne*, for the appellant Toone, were not called on.

T. R. Fitzwalter Butler, for the Crown:

It is conceded that the mistake made by the Recorder as to the time when the *alibi* was first disclosed was a defect in the summing-up, but it was not a fatal defect. Quite apart from the time when the *alibi* was first disclosed, there were a number of matters relating to the *alibi* itself which might well have caused any jury to regard it with suspicion. In several important matters the appellant Toone was contradicted by his own witnesses; and where there were marked divergences between the evidence of

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Barbara Williams and the evidence of Toone on crucial matters, the evidence of Barbara Williams was substantially corroborated by Toone's witnesses called in support of the *alibi*.

THE LORD CHIEF JUSTICE: The story for the prosecution was in some respects a remarkable one. A Mr. Hubbard had had entrusted to him, and had undertaken to take care of, a very large sum of money, £3,000, in £1 notes, belonging to a man named Pratt, who at the time of the trial was a convicted man serving a term of imprisonment. These notes were put in bundles of £50 or £100, and were put into a tin box, which was kept in a cupboard. Hubbard had £1,000 of his own, so it was said, in addition to this £3,000 which belonged to Pratt. There was some alteration of the places in which the money was kept. At one stage it was proved, or at any rate stated, that £1,050 of Pratt's money had been taken out of the tin box and put in the cupboard, but a very large sum of money was said to have been there, even after the £1,050 had been withdrawn.

Hubbard and his wife went out on the evening of October 18 at half-past seven. When they returned at half-past ten the house was in disorder. They subsequently found a broken pane of glass at the back of the house, and found that the £2,000, or more, which had been in the house, had been stolen. A young woman named Barbara Williams, who, it is said, had been Toone's mistress, deposed to conversations in a public house before the time at which the robbery was said to have been committed, and also to conversations which took place after the robbery was said to have taken place and the notes were actually in the pockets of the two thieves, or one of them. It was suggested that Barbara Williams was an accomplice. We express no opinion upon that, or upon the question of corroboration if she was an accomplice,

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for neither question has been argued before us. But, apart from criticisms of the evidence given by Barbara Williams, upon which the case for the prosecution largely rested, an answer was given which was completely convincing, if the jury chose to accept it, in the form of an *alibi*. Before the magistrates neither prisoner disclosed this *alibi*, except that Toone said that he had a defence of *alibi*. Five days after Toone had said that his defence was an *alibi* without giving any particulars, a letter was written by his solicitors to the solicitors who acted for the Leicester City Police in this prosecution, setting out in detail the *alibi* upon which Toone intended to rely.

We desire to say that an *alibi* presented in this form must obviously be open to some criticisms to which an *alibi* disclosed by an accused person when before the magistrates would not be open. It might, we think, fairly be criticised as having an air of artificiality which would not attach to an *alibi* disclosed by a person charged at the time when he first had an opportunity of disclosing it. However that may be, there were disclosed in terms to the police on February 14 details of the *alibi*, covering the period between half-past seven and half-past ten, during which time, according to the Hubbards, the housebreaking was done.

When the learned Recorder came to deal with the question of the *alibi* in his direction to the jury, he said this: "It is rather important to see when dealing with *alibi* when that *alibi* was first set up, and how it was set up, because at the police court, and it appears from a statement put in, I think, by counsel for the defence, Toone said he pleaded not guilty and reserved his defence, which was an *alibi*. He does not tell the police at any time where he was and he need not say anything about it, and therefore it was not until yesterday, when Toone went into the box, that one heard for the first time where he said he was, and who was there, the people

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who were present to give evidence, the people concerned being Mr. and Mrs. Maurice, Mr. and Mrs. Monteith, Miss Fay Evans and Toone, and for some reason Miss Fay Evans is not called." Counsel appearing for Toone, Mr. Hector Hughes, then said: "Will you allow me to make an observation? There is a letter between the parties", referring to the letter which I have mentioned, of February 14, written to the solicitors for the police. The transcript then reads: "(By the Recorder) You have got something? (By Mr. Hughes) It is a letter between the parties dealing with the very matter which should have been put in. In my submission . . . (By the Recorder) How can I deal with it when Mr. Marshall [counsel for the prosecution] is not here? (By Mr. Hughes) It is a letter between solicitors. (By the Recorder) If I am wrong about this you have got a remedy."

Now, it is right to say, in our opinion, in answer to any criticism of the learned Recorder's statement, that, so far as he was aware, what he said was absolutely true. No details of the *alibi* had been produced before the magistrates, and what he said was, so far as he was aware, a literal statement of fact. But, if the interruption had proceeded, and the learned Recorder had been told what were the facts, I have no doubt he would have corrected his statement in the light of the information which he would have received as to the letter.

Mr. Fitzwalter Butler, appearing on behalf of the Crown, concedes that the statement of the learned Recorder was a defect in the summing-up, but says it was not a fatal defect. He says that it was a defect which was not fatal because there were some obvious flaws in the *alibi*, which the jury would have detected, and it is by no means certain that they would have accepted the *alibi*. We think there is some force in those observations. I have already referred to the fact that it was produced by solicitors instead of by the witness, at the earliest five days after it might have

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been disclosed, and it was open to criticisms, to some of which Mr. Fitzwalter Butler has drawn our attention; but, in our judgment, those observations cannot alter the fact that the learned Recorder left the *alibi* to the jury under the impression that it had been produced for the first time on the day before the summing-up. It was an observation of some force, and it may well have had a very great effect upon the jury's estimation of the *alibi* when they came to consider their verdict, because they must have been under the impression that Toone had produced this *alibi* only the day before, so that the police would have had no opportunity, as the learned Recorder implied, of knowing what the *alibi* was. In our judgment, that was a fatal defect in this summing-up, because the *alibi* went to the whole root of the case for the prosecution.

We have been referred to some cases relating to comments by learned Judges upon the failure of a person charged to state his defence in answer to the charge at the earliest moment. The first was NAYLOR, 23 Cr. App. R. 177; [1933] 1 K. B. 685. There, in the judgment of Lord Hewart (Lord Chief Justice), it is pointed out that some observations were made about the failure of the person charged to make a statement. Lord Hewart said (23 Cr. App. R., at p. 180; [1933] 1 K. B., at p. 687): "When one looks at the words of the formula which must be deliberately framed, it is quite obvious that they were intended to convey and do convey to the prisoner the belief that he is not obliged to say anything unless he desires to do so. Now if those words are really to be construed in this sense, that, having heard them, an accused person remains silent at his peril and may find it a strong point against him at his trial that he did not say anything after being told he was not obliged to say anything, one can only think that this form of words is most unfortunate and misleading." A little later the Lord Chief Justice said: "It would be strange if a point could properly be made

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against an accused person if, acting on the advice of his solicitor and following the very words of that which is said to him, he remains silent, that he did not then and there disclose his defence." That, as a general proposition, stands as an expression of the proper view about criticisms of the failure of the person charged to go into the witness box at the police court.

PARKER, 24 Cr. App. R. 4; [1933] 1 K. B. 850, was a case in which there was a comment, again in the summing-up, on the prisoner's silence. There the Court of Criminal Appeal, in dealing with an observation by Avory, J., in his summing-up with regard to the non-disclosure of the defence, dealt with the facts of that particular case, which were such as to require a distinction to be made between the defences of two defendants who had disclosed their defence, and that of one defendant who had not. Swift, J., in giving the judgment of the Court, said (24 Cr. App. R., at p. 5; [1933] 1 K. B., at p. 853): "He", that is, the learned Judge, "was bound in the interest of the two other defendants to point out the difference between the cases, and there was nothing in what he said which in any way infringed the principle laid down in the authorities cited", and two authorities were cited, one of which was NAYLOR (*supra*).

Then, thirdly, we were referred to LITTLEBOY, 24 Cr. App. R. 192; [1934] 2 K. B. 408. In that case the defence of *alibi* was a substantial answer to the charge. The Lord Chief Justice (Lord Hewart) in dealing with the criticisms that were directed by the learned Judge at the trial, Avory, J., to the absence of any statement before the magistrates, said this (24 Cr. App. R., at p. 197; [1934] 2 K. B., at p. 413): "We are not seeking to lay down, nor would it be useful to lay down, any general proposition either with regard to the defence of *alibi* or with regard to the disclosure of defences. The question which we have to consider is a much more limited one—whether it is a

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misdirection for a Judge to say that failure to disclose an *alibi* in time to afford an opportunity of its being tested is something to be borne in mind with reference to the value of the defence." I need not read that passage any further; the judgment of the Court makes it quite plain that it is not a defect in the summing-up for a learned Judge to call a jury's attention to the fact that an *alibi* has not been disclosed at an early date or at the earliest possible moment. It is an observation which, if well-founded, obviously goes to the acceptability of the *alibi* set up. The fatal character of the mistake which the learned Recorder here quite unwittingly made is due to the fact that he was led, by his ignorance of the letter of February 14, into a statement that the police had had no opportunity at all of testing the *alibi*, that they had heard of it for the first time the day before the summing-up, whereas something very different was the fact, namely, that they had been informed of it for some considerable time in circumstances which gave them every opportunity of testing what was going to be suggested when the person who had been committed for trial gave his evidence at the trial.

We think it unnecessary, in these circumstances, to go into any other matters in connection with this charge, or matters which were raised when we gave leave to appeal. We think that this was a fatal defect in the summing-up, and that the convictions of these two appellants must therefore be quashed.

Appeals allowed.
Convictions quashed.

Solicitors: Clarkson, Wright & Co., agents for Herbert Simpson & Co., Leicester, for appellant Dawkins; Clarkson, Wright & Co., agents for W. E. Price, Leicester, for appellant Toone; Wright & Bull, agents for Wright, Woodrow & Aysom, Leicester, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE WROTTESLEY AND MR. JUSTICE BIRKETT.

1942.
13 & 14 *July.*

HARRY GREENBERG.

Emergency Legislation — Possessing Documents Resembling Clothing Coupons—Intent to Deceive—Whether Intent Can be Inferred from Irregular Acquisition or Disposition of Documents—Procedure in Long and Complicated Case—Defence (General) Regulations, 1939–40 (*S. R. & O.*, 1939, *No.* 927, *as amended by S. R. & O.*, 1940, *No.* 290), *reg.* 82 (1) (*b*).

By regulation 82 (1) of the Defence (General) Regulations, 1939–40: "If, with intent to deceive, any person . . . (b) . . . has in his possession any document so closely resembling [any document issued for the purposes of any of these regulations or of any order, rule or byelaw made under any of these regulations] as to be calculated to deceive . . . he shall be guilty of an offence against that regulation."

To constitute an offence against the above regulation, the prosecution are not bound to prove an intent to deceive any particular person, nor is it incumbent on the prosecution to prove that the defendant knew the particular document to be false. The intent to deceive may be inferred from an irregular acquisition or irregular disposition of the document by the defendant.

Observations on the way in which a long and complicated case should be presented by the prosecution.

CARLESS AND STAPLEY (1934), 25 Cr. App. R, 43, and SHAW AND AGARD (1942), 28 Cr. App. R. 138, referred to.

Appeal against conviction.

The appellant was convicted at Manchester Assizes on May 15, 1942, of possessing, with intent to deceive, documents resembling clothing coupons, contrary to regulation 82 (1) (b) of the Defence (General) Regulations, 1939, and was sentenced by Asquith, J., to two years' imprisonment.

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The appellant was convicted on one count only of an indictment containing forty-two counts, charges against him of conspiracy to contravene the Consumers Rationing Orders and of uttering forged documents having been withdrawn by direction of the Judge. There was evidence against him of a sale by him of a large number of coupons resembling clothing coupons wrapped in cylindrical packets. His own evidence was that a man had left 21,000 coupons with him and had asked him to procure goods with them; and that he himself had handed 3,000 of them to a man named Manches, who had told him that he thought he could get 1,000 dozen hose, but that that deal had fallen through.

In the course of his summing-up, Asquith, J., said: "You will have to consider how far you can believe anybody who, being a Manchester trader in clothing, after the rationing scheme has been in operation for quite a long time, says that he has no idea that it was wrong to buy or sell coupons. Do not mistake me; the burden of course is on the prosecution to show that these people knew it was illegal, but, as men of common sense, you can ask yourselves how likely it is that men of this trade, dealing in tens of thousands of coupons, with all the resources of the newspapers and the wireless to help them, can have remained in ignorance of so elementary a fact as that. On the other hand, you will bear in mind that it is possible for some confusion to be introduced by the fact that you may lawfully buy another man's quota."

A. E. Baucher, for the appellant.
Neville Laski, K.C., and *A. E. Jelland*, for the Crown.

The arguments appear fully from the judgment.

BIRKETT, J.: The indictment contained many counts. Nineteen persons were tried together, and separately represented by eleven counsel. There were separate charges

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against separate defendants, and there were counts which charged all nineteen defendants. The first count charged the appellant and other defendants with conspiracy to contravene the provisions of the Consumers Rationing Order, 1941, and the Consumers Rationing (No. 8) Order, 1941, and the method alleged by which the conspiracy was to be furthered was to make use, with intent to deceive, of certain documents purporting to be clothing coupons. The second count charged all the defendants with conspiracy to contravene those orders by falsely pretending that certain documents, which purported to be clothing coupons, had then been transferred by the holders of the coupons in conformity with the provisions of the Orders. Counts 19 and 20 charged the appellant with possessing on December 3, 1941, with intent to deceive, documents so closely resembling clothing coupons as to be calculated to deceive, and with uttering certain forged documents. In the result the learned Judge ruled that there was no evidence against the appellant on the counts for conspiracy, and none against him on count 20, which charged him with uttering, an essential ingredient of which was that he knew the document which he was alleged to have uttered to be false. Ultimately the appellant was left to face the charge under regulation 82 of the Defence (General) Regulations in count 19.

The complaint made here by Mr. Baucher on his behalf resolves itself into three main matters. First, it was said that the learned Judge was wrong in law in his construction of regulation 82. Secondly, it was said that, having regard to the great number of defendants charged in the indictment and the multiplicity of counts, and the difficulty of keeping the separate issues clearly before the jury as the trial proceeded, a miscarriage of justice occurred. The third point was that the summing-up was defective (a) because of the initial misconstruction of the regulation leading thereby consequentially to a misdirection in law,

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and (b) because of misdirection with regard to the evidence. [His Lordship read the regulation, and continued:] Mr. Baucher contended that, to establish the intent to deceive which the regulation makes imperative, it was incumbent on the prosecution to show that the appellant, in dealing with the documents in question, knew that they were false. It was contended on behalf of the Crown that that was not so and that, if the regulation were read in conjunction with other regulations, that was clear, and that it was enough to show that the documents in question came within the regulation as being documents so closely resembling true documents as to be calculated to deceive and that they were in fact in the possession of the person charged; and that the intent to deceive can be shown by giving evidence either of irregular acquisition or irregular disposition of them. The matter was elaborately argued before the learned Judge at the trial and he gave it most careful consideration. At first sight the argument addressed to this Court by Mr. Baucher had very considerable attraction, but, after listening to the whole of the arguments, the Court has come to the conclusion that the decision of Asquith, J., on the construction of the regulation was right. In his judgment, after setting out various considerations affecting the Rationing Orders and the Forgery Act, 1913, Asquith, J., said: "With these considerations in view and the fact that we are at war, it seems to me that what in regulation 82 (1) (b) Parliament is saying is this: once it is proved that there is an intent to deceive by means or in respect of a document, the mere possession of such a document shall be an offence; provided it is what I will, for short, call a deceptive document, people shall possess such documents at their peril, and the Crown shall not be required to prove that they are possessed with knowledge of their deceptive or colourable character, always a difficult matter, provided the Crown can establish an intent to deceive by means of dealings in respect of or

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in relation to such a document." This Court holds that that construction is the proper construction to be put on this particular regulation. It follows, therefore, that Mr. Baucher's first point fails. It is important to say upon this part of the case that the words "with intent to deceive" are not to be construed in any narrow vein, as referring to the deceiving of any particular person. If in fact on all the evidence it can be gathered that there was an attempt to deceive anybody by means of the particular document, that is enough.

Mr. Baucher's second point was that the trial itself was exceedingly unsatisfactory and led, in the result, to a miscarriage of justice. It is scarcely necessary to say that, when nineteen defendants are charged, when eleven counsel appear in a case, when twelve consecutive speeches are made to the jury, when there are some counts referring to all the defendants and other counts referring to some of them only, a situation of considerable difficulty is created. This Court has referred to such a situation on more than one occasion. In CARLESS AND STAPLEY (1934), 25 Cr. App. R. 42, where several persons were charged with various offences of obtaining money by false pretences and conspiracy to defraud, the Lord Chief Justice (Lord Hewart), in giving the judgment of the Court, said (at p. 45): "It is said that this kind of indictment is common, but in our view it ought to cease to be common. It is not fair to the accused, not fair to the jury, not fair to the Judge." In a more recent case, SHAW AND AGARD (1942), 28 Cr. App. R. 138, Cassels, J., in giving the judgment of the Court, said at p. 140: "It would not have unduly taxed the ingenuity of those responsible for the prosecution to have divided the trial into at least three parts. Such a course would have reduced the issues for the jury and rendered easier the duties of the Court. We recommend for the future guidance of those who have the charge of prosecutions that they should seriously consider the

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possibility of dividing these long and complicated cases. We think that such a course will make for the efficiency of the administration of criminal justice, and be in the interests both of defendants and juries."

The observations made in both cases apply with very considerable force here, but it is a very different matter when one comes to consider whether there was in fact such a miscarriage of justice as is contemplated by section 4 (1) of the Criminal Appeal Act, 1907. The way in which Mr. Baucher put the matter was this: that, having regard to the fact that the appellant was originally charged with conspiracy and with uttering as well as with the charge on which he was finally convicted, it was inevitable that a great volume of evidence should have been given on the other counts which would not have been strictly relevant and admissible had count 19 stood alone from the beginning; and that it was not until all that evidence had been given that Asquith, J., could give his ruling that there was no evidence to go to the jury on the counts for conspiracy or uttering. Mr. Baucher, whilst conceding that there was a discretionary power vested in the Judge either to order a separate trial of the remaining issue had he thought proper to do so, or to continue the trial with suitable warning to the jury, contended that it was impossible to exclude from the minds of the jury the inevitable prejudice which had already been created by the evidence on the other counts. This Court is not unmindful of the difficulty, but we have also to bear in mind what has been stated here, that counsel for the prosecution, Mr. Laski, whose duty it was to be a minister of justice, treated this matter, as one would expect, in the traditional way, making a very careful tabulation of the points which he desired the jury to have in mind in order that justice should be done. The warnings that he gave as counsel for the Crown were warnings on many of the matters to which Mr. Baucher has referred. We are told also that, when Mr. Baucher came to address

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the jury on behalf of the appellant, he very properly again underlined those matters and made it clear what the relevant evidence was. It may be said that, although counsel discharge their duty, their observations have not the same weight as juries naturally attach to what is said by the Judge; but in this case the learned Judge was at pains to make it clear to the jury in general terms that they could regard a statement by any particular defendant as admissible and relevant evidence only against that defendant, and that such a statement should not be regarded as evidence against any other defendant. Although the difficulty and complexity of the trial is not absent from our minds, we are satisfied, in view of the clearness with which the learned Judge emphasised the true province of the jury and also in view of the fact that he was careful to see that each prisoner's case was separately considered, that Mr. Baucher's second point also must fail.

The last point which was taken by Mr. Baucher was really a summary of the other two. It was said that the summing-up was defective, first because it was vitiated by the construction which the learned Judge had put upon the regulation, so that the direction in law was wrong; and secondly, because there were other misdirections or non-directions on the evidence having regard to all the circumstances of the case. We have considered that matter with considerable care, and the conclusion to which the Court has come is that in spite of all the criticisms which have been raised by Mr. Baucher, that this point also fails. In the result, therefore, the appeal is dismissed.

Appeal dismissed.

Counsel for the appellant then asked that the time during which the appellant had been treated as an appellant might count toward his sentence, in view of the important and difficult point of law raised.

THE LORD CHIEF JUSTICE: We will treat this case as a case in which a single Judge would certainly have given leave to appeal on the question of law. In that case the time would have counted, and, that being substantially the position here, the time will count in this case.

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Solicitors: Dunderdale, Wignall & Co., Manchester, for appellant.

BEFORE

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SAMUEL SYDNEY DASHWOOD.

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Fresh Evidence—Insanity—Refusal by Appellant to Allow Counsel to Raise Defence at Trial—Application Refused.

The appellant, who was defended at his trial on a charge of murder by leading and junior counsel, refused to allow counsel to raise a defence of insanity on his behalf, and informed the Judge that he did not wish to be defended by counsel assigned to him. Counsel accordingly withdrew from his defence, but, at the suggestion of the Judge, remained in Court as *amici curiæ* and called the attention of the Judge to evidence bearing on the question of insanity, but, apart from this, that issue was not raised. The appellant applied for leave to call fresh evidence before the Court of Criminal Appeal on the question of insanity.

Held, that the Court were in effect being asked to substitute themselves for the jury as a tribunal of fact and try the case anew on a new issue and new pleas, and that the application must be refused.

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Appeal against conviction.

The appellant was convicted at the Central Criminal Court on July 21, 1942, of murder and was sentenced by Wrottesley, J., to death.

The appellant was charged together with one Silverosa, and the case for the prosecution was that murder had been committed arising out of a common design to commit robbery with violence. At the trial the appellant, who had been assigned leading and junior counsel under the Poor Prisoners' Defence Act, 1930, refused to allow his counsel to say anything in his defence. Soon after the trial had begun he sent a note up to the Judge stating that he did not wish to be defended by the counsel assigned to him. In consequence of this, a plea of insanity which counsel wished to raise was not put before the jury. The Judge suggested that counsel should remain in Court in case they might be able to help the Court as *amici curiæ*. At the close of the case for the prosecution leading counsel for the defence called the attention of the Judge to certain medical evidence bearing on the question of insanity, but, apart from this, that issue was not raised. After counsel had withdrawn from the defence, the appellant defended himself. Later he asked that different counsel should be assigned to him, but this application the Judge refused.

The appellant complained of alleged misdirection by the Judge, and applied for leave to call fresh evidence on the question of insanity.

Serjeant Sullivan, K.C., and *W. W. Fordham*; for the appellant:

Leave to call fresh evidence on the issue of insanity is sought in the special circumstances of this case, as the appellant's counsel were unable to raise that defence at the trial. The appellant's attitude at the trial towards his legal advisers may be due to the fact that he was insane and

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incapable of appreciating that he had a defence on this ground. It is true that the question of his fitness to plead was not raised by counsel, but at that time counsel did not appreciate the attitude the appellant was going to adopt.

L. A. Byrne, for the Crown, was not called on.

August 26.—The judgment of the Court was delivered by HUMPHREYS, J. [after stating that in the opinion of the Court the allegations of misdirection were completely without foundation] : The Court is now asked to allow witnesses to be called upon a new issue and an issue different from any issue which was before the jury. It is the view of the appellant's counsel that he would have been well advised to raise the question of the appellant's sanity at the trial, but it was the express desire, and indeed the avowed determination, of the appellant that no such issue should be raised. This is, therefore, not a case in which some new evidence has come to light which was never dreamt of in the course of the trial. This is, in effect, an application that the Court should substitute itself for the jury as a tribunal of fact and try the case anew on a new issue and on new pleas which were never before the jury. This Court has no power to order a new trial and, dealing with the present case, it would indeed require some very remarkable circumstances to justify the Court in turning itself into a tribunal of fact to decide such an important matter, when that matter was deliberately withheld from the consideration of the jury by the person who is now asking the Court to embark on the inquiry.

The application appears to be based solely on the assumption which the Court is asked to make that the appellant was so insane on July 20 as not to be able to appreciate the desirability of that issue being raised on his behalf. The test of whether a person who is on his trial is sane, so as to be able to conduct his defence, is a matter which is well known to criminal lawyers and is provided for

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by the criminal law. It is a cardinal principle of our law that no man can be tried for a crime unless he is in a position to defend himself, and that includes his being in a mental condition to defend himself. That matter was present to the minds of the appellant's counsel when he pleaded Not Guilty. It was their duty to insist that the question of the appellant's ability to plead should be put to the jury, if they thought there was any doubt on that matter. It should be known that the Court acts in such a case on information conveyed to it from any quarter. It may come from the prisoner himself, from his advisers, from the prosecution or from an independent witness such as the medical officer of the prison. On the facts we can see no justification for taking such a view. It is impossible for the Court to say that the mere fact that the appellant differed from his counsel as to the best line to be taken for his defence is sufficient to prove that he was, on that date, owing to his insanity, incapable of conducting his own defence. One of the matters which this Court has to consider is the probable result of creating a precedent, if this application were granted. In our opinion, the result would be to open the door to every person charged with a serious crime to instruct his counsel to put forward such defence as he thought right before the jury, and, if that failed, to come to this Court and ask that there should be an inquiry into his state of mind, so that the Court might be induced to say that the proper verdict should have been Guilty but insane. We decline to accede to this course. Indeed, in our view, we have no power to enter on any such inquiry. The Court is within what Lord Halsbury described as the iron framework of a statute. Section 4 (1) of the Criminal Appeal Act, 1907, provides: "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported

having regard to the evidence . . . or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal." The only course, therefore, which the Court can adopt is to refuse the application and dismiss the appeal.

Appeal dismissed.

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BEFORE

The LORD CHIEF JUSTICE, Mr. JUSTICE TUCKER AND Mr. JUSTICE CASSELS.

REGINALD JOHN BETTERIDGE.

1942.
13 *October.*

Sentence—Past Offences—How Far to be Considered.

Reduction of a severe sentence passed mainly on the ground of the prisoner's past record.

Appeal against sentence.

The appellant pleaded guilty at Gloucester City Sessions on August 25, 1942, to housebreaking and stealing a small sum of money and a quantity of cigarettes and was sentenced by the Recorder to three years' penal servitude.

The facts are sufficiently stated in the judgment.

No counsel appeared on either side.

THE LORD CHIEF JUSTICE: The appellant is twenty-one years of age. In earlier years he has committed offences of a character similar to the offence now under consideration. In 1940, when he was nineteen years old, he was fined for larceny. A month or two later he was bound over for breaking into a cinema and larceny; three months later he was sentenced to a term of nine months' imprison-

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ment for shopbreaking and larceny; and he was again bound over in January, 1942, for shopbreaking and larceny. Obviously he has not benefited by the warnings which he has received and he has not taken advantage of the leniency which was shown to him, partly, no doubt, in consideration of his youth and partly, also, because he lost his father when he was ten years old.

In his grounds of appeal he suggests that the previous offences which he committed were committed by him as a youth and ought not to be considered now that he is a grown man. He says that he does not think he should have been sentenced to three years' penal servitude for his first offence as a man.

The learned Recorder, in passing sentence on the appellant, calculated—and the calculation seems to be perfectly accurate—that the appellant has committed something like nineteen different offences of shopbreaking or officebreaking and larceny since January 1, 1941, and in consideration of that fact thought that he was justified in passing a very severe sentence.

We think that it is not right to hold over a man's past offences which have been dealt with by appropriate sentences, as we must assume past offences have been dealt with, and add them up and increase accordingly the severity of the sentence for a later offence. That is dangerously like punishing a man twice over for one offence. If a man who has been convicted shows himself unresponsive to leniency and persists in a life of crime, that is a reason for giving him the proper and deserved sentence in the particular case. If, on the other hand, there are some merits, it may be that the Court will treat him more leniently because he has shown himself in some way responsive to the warnings which he has had.

In this case we have come to the conclusion that the sentence of three years' penal servitude was passed on the appellant partly on the ground of the previous offences in

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respect of which he had been already sentenced. We think that the sentence was wrong and that the proper sentence is one of a shorter term of imprisonment. Bearing in mind the fact that the appellant had disregarded warnings and was, therefore, entitled to no particular leniency, we substitute for the sentence passed a sentence of imprisonment for twenty months.

Sentence reduced.

BEFORE

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CARLO OLIVO.

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Indictment—Duty of Clerk of Court and Counsel—Trial of Three Indictments Together—No Order in Nature of Venire de Novo—Convictions Quashed—Shorthand Note—Words Used in Giving Prisoner in Charge to be Recorded.

In every case the Clerk of the Court should see that the presiding Judge has the actual indictment or an accurate abstract thereof before him. Counsel both for the prosecution and the defence should acquaint themselves with its terms.

The shorthand note should record the actual words used when the prisoner is given in charge to the jury.

Conviction quashed, and no order in nature of *venire de novo* made, in a case where three indictments were, by inadvertence, tried together.

Appeal against conviction.

The appellant was convicted at Grantham Quarter Sessions on July 8, 1942, of conspiracy to defraud and obtaining money by false pretences and was sentenced by the Deputy-Recorder to concurrent terms of six months' imprisonment. There were three separate indictments.

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The first charged the appellant and a co-prisoner named William Charles Murray with conspiracy to defraud; the second charged the appellant with obtaining money by false pretences; and the third charged Murray with attempted fraudulent conversion of money. By inadvertence the three indictments were tried together.

Rees-Davies, for the appellant:

As three indictments were tried together, the trial was a nullity. [He was stopped.]

R. H. Blundell, for the Crown:

It is conceded that the trial was a nullity, and it is submitted that the Court should in the circumstances make an order in the nature of a *venire de novo*, as was done in CRANE *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 15 Cr. App. R. 183; [1921] 2 A. C. 299.

Rees-Davies, in reply:

The Court has not always adopted that course in cases where the trial has been a nullity. In MCCONNELL (1928), 20 Cr. App. R. 163, and WILDE (1933), 24 Cr. App. R. 98, the Court merely quashed the conviction, and it is submitted that that should be done in this case, as the appellant and his co-prisoner have already served a substantial part of the sentences imposed.

TUCKER, J.: It appears to be the fact that three indictments were tried together at the same time. That irregularity is most unfortunate for several reasons. First, there is no reason why all these three charges should not have been included in one indictment, in which case there would have been no objection to all three being investigated together. That would have been the proper and normal procedure to adopt. Furthermore, in this particular case there appear to be no merits in the appeal. None the less, it has for a great number of years been elementary in

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criminal procedure that, if there is more than one indictment, the indictments cannot be tried together, and any so-called trial at which such a procedure has been adopted is a complete nullity.

This irregularity has occurred before, and on at least one occasion this Court drew attention to the desirability of the Clerk of the Court seeing that things are done in a regular way. It is his duty to see that the presiding Judge has before him the actual indictment or an accurate abstract thereof. Apart from that, it is the duty of counsel for the prosecution to make himself aware of the document on which he is founding the case against the prisoner, and every counsel for the prosecution should see the indictment or indictments. It is equally the duty of counsel for the defence to acquaint himself with the charge that is made against the prisoner whom he is defending. There appears in this case to have been a most unfortunate failure on the part of all persons concerned to acquaint themselves with the form of the charges against the prisoners. The result is that the whole proceeding, so far as concerns the present case, was a complete nullity. There was no jurisdiction to proceed in the way in which this trial did proceed.

I also desire to draw attention to the form of the shorthand note of the proceedings in this case, in which it is said: "The jury were duly sworn and charged." The record of all the proceedings, including formalities leading up to the actual evidence, should be set out *verbatim* in the shorthand note, so that this Court can see the manner in which the prisoner was given into the charge of the jury. In this case the prisoners were apparently put in charge on three indictments, and this matter would have become clearer if the shorthand note had recorded what actually took place instead of using the summarised statement that "the jury were duly sworn and charged". In fact they were not duly charged. It was a very undue proceeding.

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In these circumstances, these convictions of the appellant cannot stand, and the Court has given consideration to the course which should be adopted. The Court clearly has jurisdiction to make an order in the nature of a *venire de novo*, which means that the appellant would be ordered to attend and take his trial again in respect of the charges, to plead to the indictments, and to be tried thereon duly according to law. On the other hand, there have been cases where, for reasons which the Court has thought proper, the Court has not taken that course, but has merely quashed the conviction. In this particular case the appellant has served about half of his so-called sentence before the hearing of his appeal, and in all the circumstances of the case the Court has come to the conclusion that the two convictions of the appellant should be quashed. As the indictment for conspiracy involves William Murray also, although there is no application before the Court by Murray, it follows as a matter of course that the conviction of Murray for conspiracy must also be quashed.

Convictions quashed.

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WILLIAM OSWALD FEATHERSTONE.

Evidence — Character of Prisoner — Prejudicial Statement Inadvertently Made by Witness—Undefended Prisoner—Duty of Judge.

Where an irregularity, such as the accidental disclosure of a previous conviction, takes place in the course of the trial of an undefended prisoner, it is the duty of the Judge

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to inform him that he has the right to apply that the jury should be discharged and the trial started afresh, and that, if he desires to make that application, he should make it forthwith. If an application is made to that effect, it is the duty of the Judge to decide upon it according to the circumstances of the case.

FIRTH (1938), 26 Cr. App. R. 148, considered.

Appeal against conviction and sentence.

The appellant pleaded guilty at the County of London Sessions on July 23, 1942, to two charges of stealing and was convicted on two further charges of receiving stolen clothing and was sentenced by the Deputy Chairman to five years' penal servitude.

The appellant was charged, together with his wife, his mother-in-law (Mrs. Silversten), and Mrs. Standing. The other three prisoners were discharged in the course of the trial. The appellant was not represented by counsel. Mrs. Silversten went into the witness-box to give evidence for Mrs. Standing, and counsel for the prosecution asked her in cross-examination: "Did you know what Featherstone was?" The object of the question was to ascertain whether the appellant was a dealer in old clothes, Mrs. Silversten's story being that he had given her the clothes which were the subject of the charge and that she had passed them on. The witness replied: "Yes, I was told he had been in prison once." The Deputy Chairman told the jury to leave this piece of evidence out of their minds.

H. D. Baskerville, for the appellant, referred to FIRTH (1938), 26 Cr. App. R. 148, and PECKHAM (1935), 25 Cr. App. R. 125.

H. Fenton, for the Crown:

Any adverse impression that may have been created in the minds of the jury was sufficiently removed by the Deputy Chairman's direction to them to disregard the incident. In any event, there has been no substantial miscarriage of

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justice, as the evidence against the appellant was overwhelming, and the Court is invited to apply the proviso to section 4 of the Criminal Appeal Act, 1907.

THE LORD CHIEF JUSTICE: The first question which we have to consider is whether the irregularity was one which had the effect of making the trial an improper one. The Deputy Chairman did his best to correct the mistake, and told the jury that they must act simply on the evidence and that, if they had heard one of the witnesses slip out what she had heard about Featherstone's character, they were to leave that out of their minds, for it had nothing to do with the case. In our view, not only was the answer one which should not have been given, but the irregularity was one which ought to have been taken notice of in some way beyond the mere direction to the jury, which was quite proper in itself, but was, in our judgment, not adequate in the circumstances.

The appellant was undefended. There have been a number of cases in which a similar irregularity took place. In those cases the prisoners were defended, and in one of them, FIRTH (1938), 26 Cr. App. R. 148, application was made by the prisoner's counsel for discharge of the jury. It was held that in those circumstances it was the duty of the Court to begin the trial afresh before a new jury. The Lord Chief Justice (Lord Hewart) said (at p. 153): "It is not very profitable or satisfactory to enter on the sphere of inquiries with regard to the precise effect which may be produced on the mind of a juror—and still less on the minds of a collection of jurors—by a piece of evidence, but the principle laid down by the Court is that, where an irregularity manifestly takes place, then there ought to be an end of the trial in that form. It seems to us in a high degree dangerous to permit the trial to continue to its end where such an irregularity has occurred as that which here was inadvertently permitted." It is unnecessary to refer to

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earlier cases where observations of a similar character were made. We agree with them.

There is one addition which we think should be made to the rule there laid down by the Lord Chief Justice. He was dealing with a case where counsel appeared for the prisoner and made an application for a new trial. In cases where a prisoner is not defended, and an irregularity of this character takes place, it is, in our opinion, the duty of the Judge to inform the prisoner that he has a right to submit that the trial should not proceed, and that he should make the application then and there if he wishes to do so. It by no means follows that in every case the prisoner would desire to apply for a fresh trial, but, if an application is made to that effect, it is the duty of the Judge to decide upon the application according to the circumstances. In this case the appellant was not informed of that right. Whether or not he knew that he had the right it is not possible for us to decide, but, the opportunity not having been given to him to apply for the jury to be discharged, we think that a manifest irregularity took place.

The matter must, however, be considered in the light of the proviso to section 4 of the Criminal Appeal Act, 1907. That proviso allows the Court, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, to dismiss the appeal, if they consider that no substantial miscarriage of justice has actually occurred. Here the appellant had made a statement on committal which amounted almost to an admission of guilt. He said: "I take sole responsibility and the rest have no knowledge where it came from, and do not know it was stolen. I told them I was a dealer". When he was addressing the Deputy Chairman in mitigation of sentence, he made a statement to the effect that he was very sorry to have got his wife and innocent friends into trouble and was glad to think they had been cleared. In addition to those two statements, there was the damning fact that a large

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quantity of the stolen clothing was found in his room, and there was the improbable story which he told to the effect that some soldiers, unknown to him by name, in the early hours of the morning had asked him to look after the property.

In our opinion, it was impossible for anyone, after hearing that evidence, to arrive at any conclusion other than that the appellant was guilty of the offences charged. In those circumstances, it seems to the Court that no substantial miscarriage of justice has actually occurred here and that, although we think there was an irregularity in the trial, the conviction should not be quashed. [His Lordship went on to say that, in the opinion of the Court, there were no grounds for interfering with the sentence.] The appeal must be dismissed.

Appeal dismissed.

Solicitor : Solicitor for Metropolitan Police, for the Crown.

BEFORE

The LORD CHIEF JUSTICE, Mr. JUSTICE TUCKER AND Mr. JUSTICE CASSELS.

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Sentence—Incorrigible Rogue—Enquiry Into Circumstances of Case Essential at Quarter Sessions—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 10.

Where a person is committed to quarter sessions for sentence as an incorrigible rogue, it is essential that, before

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sentence is passed, there should be an examination into the circumstances of the conviction at petty sessions.

COPE (1925), 18 Cr. App. R. 121; [1925] W. N. 108; HOLDING (1934), 25 Cr. App. R. 28; and LONG (1934), 25 Cr. App. R. 31, followed.

RIORDAN (1937), 26 Cr. App. R. 30, applied.

Appeal against sentence.

The appellant appeared at Bow Street Police Court on the charge of being a reputed thief frequenting premises. On September 11, 1942, she was convicted on that charge, and, a previous conviction of being a rogue and vagabond having been proved, she was committed by the magistrate to the County of London Quarter Sessions for sentence as an incorrigible rogue. On September 23, 1942, the Deputy Chairman sentenced her to six months' imprisonment.

When the appellant appeared at the County of London Sessions for sentence, a police officer went into the witness-box and gave evidence that he was present at Bow Street on September 11 when the appellant was convicted of being a reputed thief, and was also present when previous convictions were proved. Counsel appearing for the appellant submitted that the case had not been presented in proper form, that it had been held that the Court of Quarter Sessions which passes sentence must inquire into the circumstances of the conviction at petty sessions, and that in the circumstances the Court had no power to pass any sentence at all.

G. L. Hardy, for the appellant:

The submission made by me to the Deputy Chairman at the County of London Sessions was based on the authority of three cases: COPE (1925), 18 Cr. App. R. 121; [1925] W. N. 108; HOLDING (1934), 25 Cr. App. R. 28; and LONG (1934), 25 Cr. App. R. 31. Here there was no examination into the circumstances of the case, and as the provisions of section 10 of the Vagrancy Act, 1824, were not

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complied with, the Court had no power to pass a further sentence.

R. H. Blundell, for the Crown:

The only difference between the present case and those cited is that in the present case the appellant was represented by counsel at Quarter Sessions. It is, however, conceded that what took place at that Court was not adequate.

CASSELS, J.: It is important to observe what are the words of section 10 of the Vagrancy Act, 1824, which provides: "When any incorrigible rogue shall have been committed to the house of correction, there to remain until the next general or quarter sessions, it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned in the house of correction, and be there kept to hard labour for any time not exceeding one year from the time of making such order. . . ." Unfortunately, through inadvertence, there was here no inquiry into the circumstances of the case, although counsel representing the appellant was in a position, if the circumstances of the case had been presented to the Court, to cross-examine upon them. But he was not able to cross-examine because no circumstances were put before the Court.

This matter has been before this Court on other occasions. It was before the Court in HOLDING (*supra*), in LONG (*supra*), and in COPE (*supra*). In each of those cases it was emphasised that it is the duty of the Court of Quarter Sessions in such cases to inquire into the circumstances. The matter was mentioned also in RIORDAN (1937), 26 Cr. App. R. 30, which was concerned with committal to Quarter Sessions with a view to a sentence of detention in a Borstal institution being passed, and it was there suggested that it would be wiser that counsel should be employed to prosecute in such cases in order that the circumstances should be pre-

sented to the Court. Perhaps that is a hint which might be taken into consideration when other cases similar to the present case come before a Court of Quarter Sessions, so that the words of the statute may be observed.

The result is that the sentence must be quashed.

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Sentence quashed.

BEFORE

MR. JUSTICE TUCKER, MR. JUSTICE ASQUITH AND MR. JUSTICE CASSELS.

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Receiving Stolen Property—Indictment—Separate Receivings by Different Persons at Different Times Not to be Included in One Count—Summing-up—More than One Prisoner Charged—Necessity for Direction on Evidence against Each Prisoner—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 40 (3).

Where there is an allegation of separate receivings of stolen property by different persons at different times, such persons ought not to be charged in the same count of an indictment.

In such a case, it is essential that the summing-up should deal separately with the evidence with regard to receipt in the case of each prisoner, and with regard to the state of mind of each prisoner when he received the property.

Appeals against conviction.

The appellants were convicted at the County of London Sessions on October 1, 1942, of receiving seven stolen typewriters and were each sentenced by the Chairman to six months' imprisonment with hard labour.

The following statement of facts is taken, in substance, from the judgment. Seven typewriters were stolen from the

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premises of the Overseas League towards the end of 1941. About January, 1942, Farrow (who was charged together with the two appellants with receiving) bought them from a man named George, and then sold them to the appellant Pearl for £14 apiece. The appellant Pearl then sold them to the appellant Arnold for £18 apiece, and the appellant Arnold then sold them to a man named Lever for £21 apiece. Pearl and Arnold were brothers-in-law and men of irreproachable character. Lever, who was also a man of irreproachable character, paid the appellant Arnold for the typewriters by cheque and gave him a receipt for the goods. Farrow had been previously known to the appellant Pearl as a man carrying on business near the place where Pearl worked. There was no evidence that any of the three persons charged had any particular knowledge of the price of second-hand typewriters at the material time. There was some evidence that the prices of £14, £18 and £21 were considerably below what was stated to have been the value of second-hand typewriters at that time.

J. P. Valetta, for the appellants.
R. H. Blundell, for the Crown.

TUCKER, J.: The two appellants were tried together with a man named Farrow. The three men were charged in one count that between December 20, 1941, and January 24, 1942, they did receive seven typewriters, the property of the Overseas League, knowing the same to have been stolen. That charge, so framed, would, on the face of it, indicate a joint charge of receiving by the three men. The evidence for the prosecution, if accepted, went to prove three separate receivings. In our view, there is nothing to justify the inclusion of three quite separate offences by three different people in one count, and such inclusion is not justified by section 40 (3) of the Larceny Act, 1916, which provides: "In an indictment for feloniously receiving any property under

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this Act any number of persons who have at different times so received such property or any part thereof may be charged and tried together." But, however that may be, it is not necessary to base our decision in this case on the form of the indictment. We do, however, think that the form of the indictment may possibly have been a cause of the summing-up being in the form in which it was.

The learned Chairman began his summing-up by giving to the jury an accurate direction on the law of receiving in general as applicable, at any rate, to a charge of joint receiving by three men. He later on, more than once, gave a perfectly accurate direction on the onus of proof and on the way in which the jury should deal with the explanations of the prisoners. He then proceeded, in effect, to read out to the jury the evidence which had been given during the case. He ended up with a general direction on receiving and on the onus of proof. In some cases that method of summing-up may be a perfectly satisfactory one. In the circumstances of this case we do not think that it was, because no direction—at any rate, no clear direction—was ever given to the jury on the necessity of dealing separately with each individual case. The possibility of one of the prisoners being guilty and others not guilty, or of two of them being guilty and one not guilty, is not dealt with. The jury were not directed that the state of mind of each of the three prisoners at the moment when he received the typewriters may have been quite different from the state of mind of each of his co-prisoners at the time when that co-prisoner received them. The case is left to the jury as if it were a question of finding all of the prisoners guilty or all not guilty. The question was not a mere question of using a particular formula, such as: "Consider the cases separately." In our view, this was essentially a case in which it was necessary to direct the attention of the jury to the evidence which had been given with regard to the receipt by each of the three prisoners. The relationship of the one

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to the other, the existence of documents in the case of Farrow, and in the case of the disposal of the goods to Lever, are all matters to which the attention of the jury should have been directed on the issue whether they were satisfied that the cases had been separately proved against each of the individual prisoners, and on the issue as to the state of knowledge of each of the three prisoners when they took part in the respective transactions. This is especially desirable and necessary, having regard to the fact that the prisoners were men of irreproachable character.

For these reasons, we are of opinion that the summing-up was defective and amounted to a misdirection. The appeals must be allowed, and the convictions quashed.

Convictions quashed.

Solicitors: Addis, Edwards & Co., for appellants; Solicitor of Metropolitan Police, for the Crown.

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